

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Douglas A. Kelley, in his)	File No. 19-cv-1756
capacity as the Trustee of the)	(WMW)
BMO Litigation Trust,)	
)	
Plaintiff,)	St. Paul, Minnesota
)	October 26, 2022
vs.)	9:01 a.m.
)	
BMO Harris Bank N.A., as)	
successor to M&I Marshall and)	
Ilsley Bank,)	
)	
Defendant.)	

BEFORE THE HONORABLE WILHELMINA M. WRIGHT
UNITED STATES DISTRICT COURT JUDGE

* * * REDACTED TRANSCRIPT * * *

(JURY TRIAL PROCEEDINGS - VOLUME XI)

Proceedings reported by certified court reporter;
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P R O C E E D I N G S**IN OPEN COURT****(JURY PRESENT)**

THE COURT: Good morning. Please be seated.

Good morning.

THE WITNESS: Good morning.

MR. SCHAPER: Good morning, Your Honor.

THE COURT: Good morning.

MR. SCHAPER: May I proceed?

THE COURT: Yes, you may.

MR. SCHAPER: Thank you.

(John Vanderheyden)**DIRECT EXAMINATION** (Continued)

BY MR. SCHAPER:

Q. Mr. Vanderheyden, good morning.

A. Good morning.

Q. You testified yesterday that before 2005 -- before 2005, e-mails were stored on backup tapes and e-mail servers; is that right?

A. That's correct.

Q. At that time were e-mails also kept on individual users' computers?

A. They could be, yep.

Q. Okay. Now, I'd like to talk about the period before 2010. Did M&I have servers where its e-mails were stored?

1 A. Yes.

2 Q. And can you tell me about the server system that M&I had
3 during that time.

4 A. At that time we had a server system that consisted of, I
5 believe, 11 servers, nine of which were out in regional
6 hubs. One of those regional hubs would have been Minnesota;
7 another would have been Arizona; another in Madison,
8 Wisconsin, so on and so forth.

9 There were also two e-mail servers that were in
10 the greater Milwaukee area; one at the headquarters in
11 downtown Milwaukee, the second in a location called
12 Brookfield, which was -- which is a suburb of Milwaukee.

13 Q. Okay. So with these 11 regional servers, did M&I decide
14 at some point to consolidate these regional servers?

15 A. We did.

16 Q. And why did M&I decide to do that?

17 A. There were several reasons. The largest was the fact
18 that we needed to upgrade the version of Lotus Notes
19 software, and when I say we needed to upgrade it, it is
20 because the version that we were running was about to go end
21 of life.

22 End of life means a few things. Number One, no
23 additional support for problems. It means no future
24 releases of functionality. And the biggest is no further
25 security patches.

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1 Q. And when you say "no further security patches," what
2 does that refer to?

3 A. That would refer to should some flaw in the software be
4 exploitable by a bad actor, there would be no further
5 patches to close that door.

6 Q. And what about the hardware, the actual equipment of the
7 regional servers, was that also nearing end of life?

8 A. Yeah. The majority of it, greater than 75 percent of
9 those regional servers had reached basically their end of
10 life and would have needed replacement within a year or two.

11 Q. When M&I was deciding to consolidate its servers, was
12 that something that was considered by your IT group at the
13 time?

14 A. It was.

15 Q. And did your group consult any outside software or
16 hardware providers as you were making this decision?

17 A. Yeah. We consulted with both Microsoft and with IBM.

18 Q. And who made the recommendation to consolidate the
19 servers?

20 A. That would have been me and my team.

21 Q. And approximately when did the IT department begin
22 planning the consolidation project?

23 A. Probably in the time frame of June-ish 2009, maybe just
24 a bit before that.

25 Q. Mr. Vanderheyden, I'd like to show you what's been

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1 marked for identification DX-70000. If you would turn in
2 your binder to that.

3 A. Okay.

4 Q. Do you recognize this document, Mr. Vanderheyden?

5 A. I do.

6 Q. At a high level, what is it?

7 A. This is a presentation that I actually authored and
8 presented to the management team of M&I support services,
9 which was the operational group within M&I Bank at the time,
10 describing what we were doing relative to the e-mail servers
11 and services.

12 Q. And what's the date on this presentation?

13 A. February 2010.

14 Q. And you said that you authored it?

15 A. I did.

16 Q. And did you give the presentation?

17 A. I did.

18 Q. Did you create this presentation in the normal course of
19 your duties at M&I?

20 A. Yes.

21 MR. SCHAPER: Your Honor, we offer into evidence
22 DX-70000.

23 MR. COLLYARD: Objection, Your Honor, based on the
24 basis that we spoke about late afternoon yesterday.

25 THE COURT: Objection is overruled.

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1 MR. SCHAPER: All right. If we could please
2 publish that.

3 BY MR. SCHAPER:

4 Q. So, again, just briefly, Mr. Vanderheyden, what was the
5 purpose of this presentation?

6 A. It was just to describe at a very high level how we were
7 rearchitecting and consolidating these services.

8 Q. Okay. If we could please turn to the next page of your
9 presentation.

10 A. Would that be page 3?

11 Q. Yes. It's DX-70000-0003. And this says, "Mail and
12 Application Servers (11)." Are these the 11 regional
13 servers that you testified about a few minutes ago?

14 A. They are.

15 Q. And the Milwaukee and Brookfield servers are kind of set
16 off to the right in bigger boxes. Can you explain what you
17 were communicating there.

18 A. They were, in fact, larger servers and -- but, more
19 importantly, they were maintained in our two core data
20 centers at the time. When I say "core data centers," it
21 meant that they were better environmentally protected with
22 redundant power, redundant cooling, Halon gas fire
23 suppression, video surveillance and badge access.

24 Q. And did all the regional servers that are on the left,
25 did all of those servers have the same attributes that you

1 just described?

2 A. Not the environmentals in their locations, no.

3 Q. If you look at the next page of your presentation, 0004,
4 what were you communicating here when you gave this
5 presentation?

6 A. Two points here. One was elimination of all of those
7 e-mail servers in those regional hubs and the addition of
8 two larger boxes -- one again in Milwaukee at the downtown
9 data center, and one in Brookfield -- that would serve the
10 functions of all of those regional servers.

11 Q. And if we turn to the next page of the presentation,
12 Mr. Vanderheyden, it says, "What We Gain. Centralization,
13 Consolidation, and Clustering." Does the remainder of the
14 presentation explain the benefits there?

15 A. Yes, of each of them.

16 Q. Okay. So let's go to the next page, then, and this --
17 am I right that this is talking about the benefits of
18 centralization?

19 A. Yes, the first page is about breaking down
20 centralization.

21 Q. And can you just explain for the jury what you were
22 communicating here.

23 A. Okay. Well, the first bullet point is that all of our
24 e-mail will be served out of those two higher-grade
25 facilities.

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1 It took advantage of upgrades to the Wide Area
2 Network, and that is the private network that M&I subscribed
3 to, such as what you would do for your own ISP at home and
4 what have you.

5 Q. And protecting equipment in higher-grade data centers,
6 is that what you were referring to a few minutes ago?

7 A. That's what I was referring to, yes.

8 Q. So the Milwaukee and Brookfield, Wisconsin, data centers
9 were the higher-grade, higher-protection ones rather than
10 the regional servers?

11 A. That's correct.

12 Q. And what does "services and expertise in same location"
13 refer to?

14 A. That simply meant that all of our messaging engineers
15 resided in the Milwaukee area.

16 Q. Thank you, Mr. Vanderheyden.

17 Let's turn to the next page, and this says,
18 "Consolidation." Can you please explain for the jury what
19 the benefits of consolidation were when it came to the
20 server consolidation project that you have been testifying
21 about.

22 A. Correct. Okay. So the two keys on here are Points Two
23 and Three. The end of the day there are just less moving
24 parts to manage, less servers, less service contracts on
25 each one, less licensing, you name it. So at the end of the

1 day, less moving parts in the environment, and, therefore,
2 we lowered our overall operating costs in both licensing and
3 maintenance.

4 Q. And you said, "The Less in Less is More." What does
5 that refer to?

6 A. That means even though we were not replacing all of
7 these servers one by one in kind, we will have less servers
8 in the environment, but it's actually going to provide us
9 more capability.

10 Q. All right. If we turn to the next page, and this is the
11 third of the benefits in your presentation, it talks about
12 "clustering." Can you explain to the jury what this refers
13 to.

14 A. Sure. And this is an important point, because when we
15 put those two new larger servers, one in Milwaukee, one in
16 Brookfield, they were actually identical copies of each. So
17 all mailboxes were available on each of those servers. We
18 pointed half of the user population to say that's your
19 primary home. The other half it was their primary home at
20 the other location.

21 The key is, should we have an issue, whatever the
22 issue might be, a network issue, a building fire, an
23 electrical issue, you name it, at one of those facilities,
24 we could simply point the users that were pointed there as
25 their primary to the other one, and within a matter of a

1 minute, have everybody back up and running.

2 Q. Under the old regional server system, what would have
3 happened if there was some kind of outage at a regional
4 server, whether it be the one here in Minnesota or Phoenix
5 or wherever, what would have happened then?

6 A. We would have waited for parts. And it could have
7 been -- you know, we would have measured uptime again in
8 days or weeks rather than in minutes.

9 Q. And can you just briefly explain, Mr. Vanderheyden, what
10 it means when you say, "Reduced unplanned incident outages
11 and reduced planned change outages."

12 A. So reduced unplanned meant incidents that we didn't plan
13 for, such as, call it power, fire, network, what have you.

14 Planned outages are those that we would plan for
15 and, for instance, do a software, hardware, operating system
16 upgrade.

17 Q. And then finally, can you just explain what you were
18 communicating in this presentation when you say, "The More
19 in Less is More."

20 A. This is another example of how we are getting more out
21 of less equipment.

22 Q. When was the server consolidation project that we've
23 been talking about completed?

24 A. In the first quarter -- first or second quarter of 2010.

25 Q. Okay. To your knowledge, were any of M&I's lawyers

1 involved in or aware of this presentation?

2 A. No.

3 MR. COLLYARD: Objection, Your Honor, based on the
4 conversations we had yesterday and the rulings of the Court.

5 MR. SCHAPER: I'm just asking about his knowledge,
6 Your Honor.

7 THE COURT: Pardon me?

8 MR. SCHAPER: I'm just asking about his own
9 personal knowledge.

10 THE COURT: As to what?

11 MR. SCHAPER: As to whether particular people were
12 aware of this presentation.

13 MR. COLLYARD: Objection, Your Honor, he said
14 lawyers.

15 THE COURT: Sustained.

16 BY MR. SCHAPER:

17 Q. Mr. Vanderheyden, were there any M&I lawyers in
18 attendance when you gave this presentation?

19 A. No.

20 MR. COLLYARD: Same objection, Your Honor.

21 THE COURT: Sustained.

22 BY MR. SCHAPER:

23 Q. Mr. Vanderheyden, was all of the data from the regional
24 servers transferred and maintained on the consolidated
25 servers?

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1 A. Yes, all of the data that was on every one of those
2 regional servers was transferred over to that consolidated
3 server set.

4 Q. And as part of this e-mail server consolidation, were
5 backup tapes made?

6 A. There was a final -- yeah, there was normal course of
7 business backups made all along the way, and then we took a
8 final backup of those regional machines before we turned
9 them off.

10 Q. Can you just explain -- I think you've talked about this
11 briefly yesterday, but what is a backup tape?

12 A. A backup tape is simply a copy of what exists on that
13 server at the point in time where the backup is taken.

14 Q. And what is the purpose of backup tapes?

15 A. Disaster recovery.

16 Q. So if a backup tape were made today and then a second
17 backup tape were made tomorrow, what would be the difference
18 in their contents?

19 A. Well, the vast, vast majority would be the same. The
20 only difference between Day One and Day Two would be new
21 mail sent or received on Day Two, which wouldn't have been
22 on Day One's, and any e-mail deleted on Day Two. So add
23 one, subtract the other; but, in general, you know, 99
24 percent of the contents was the same.

25 Q. Returning to the consolidation project, why were backup

1 tapes made as part of that project?

2 A. Safety measure.

3 Q. And so what happened to the e-mail backup tapes that
4 were made from those regional servers after the server
5 consolidation project was successful?

6 A. Those were held.

7 Q. I'm sorry?

8 A. Those were held.

9 Q. Did there come a time when -- after the consolidation
10 project was successful that those backup tapes were
11 recycled?

12 A. I don't know for sure, and it could have happened after
13 I had left M&I. I don't know.

14 Q. Did there come a time after the server consolidation
15 project was successful that those backup tapes -- those
16 normal course backup tapes were no longer needed?

17 A. Yes.

18 Q. Okay. And at that point when it was determined that
19 they were no longer needed, were they then recycled?

20 A. Yes.

21 Q. When that was done, did M&I even have the equipment that
22 would have been necessary to read those backup tapes?

23 A. No.

24 Q. And at the time of the consolidation, again, in 2010,
25 did M&I have an e-mail system for -- strike that.

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1 At the time of the consolidation, did M&I have a
2 system for e-mail retention?

3 A. We did.

4 Q. And what was that system?

5 A. Again, that was the Legato e-mail system, which was an
6 actual archive of every transaction.

7 Q. And is Legato what you talked about yesterday as
8 maintaining a copy of all e-mails sent and received from any
9 employee since March 2005?

10 A. Yes.

11 Q. And that also included all e-mail attachments?

12 A. Yes.

13 Q. Mr. Vanderheyden, did the server consolidation project
14 that we've been talking about have anything to do with Tom
15 Petters or PCI?

16 A. No.

17 Q. Did the recycling of backup tapes after that project was
18 complete have anything to do with Petters or PCI?

19 A. No.

20 Q. Did anyone from outside the IT department at M&I direct
21 that backup tapes be recycled?

22 MR. COLLYARD: Objection, leading.

23 THE COURT: Overruled.

24 THE WITNESS: Can I answer?

25 THE COURT: You may answer.

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1 THE WITNESS: No.

2 BY MR. SCHAPER:

3 Q. Were the backup tapes recycled for the purpose of
4 concealing the information that was contained on them?

5 MR. COLLYARD: Objection, leading, Your Honor.

6 THE COURT: Sustained.

7 BY MR. SCHAPER:

8 Q. Mr. Vanderheyden, when you were involved in the
9 consolidation project, did you even know what documents or
10 information were on the backup tapes?

11 A. No.

12 Q. Given that you didn't know, was there any reason for the
13 recycling that related to trying to conceal the information
14 on the tapes?

15 MR. COLLYARD: Objection, leading and
16 argumentative.

17 THE COURT: Sustained.

18 BY MR. SCHAPER:

19 Q. Mr. Vanderheyden, what steps would you have needed to
20 take to have figured out what documents were on the backup
21 tapes?

22 A. The only way to do that would have been to load up the
23 backup tape onto another server, open up a Lotus Notes
24 client and basically read every e-mail. There were --

25 Q. Did you -- I'm sorry.

1 A. -- very limited search capabilities.

2 Q. Did you ever consider doing that?

3 A. Absolutely not.

4 Q. Did you personally ever hear anyone else consider doing
5 that?

6 A. No.

7 Q. In recycling the backup tapes, did it ever occur to you
8 that you might be getting rid of the only copies of
9 documents that could be relevant to a litigation?

10 MR. COLLYARD: Objection, Your Honor, leading.

11 THE COURT: Overruled.

12 THE WITNESS: No.

13 BY MR. SCHAPER:

14 Q. Mr. Vanderheyden, do you -- am I correct that you have
15 been deposed in this case before?

16 A. I have.

17 Q. You've had your deposition taken?

18 A. Correct.

19 Q. Do you recall at one of your depositions seeing a
20 subpoena concerning PCI in 2008?

21 A. Yes.

22 Q. And before being involved in depositions for this
23 lawsuit, had you seen that subpoena before?

24 A. That was the first time I saw that.

25 Q. Okay. If you would turn to P-228, Mr. Vanderheyden.

1 Do you recognize this as the subpoena that you
2 were shown during your deposition?

3 A. Yes.

4 Q. And it's dated September 23rd, 2008?

5 A. Yes.

6 MR. SCHAPER: Your Honor, we'd offer P-228 into
7 evidence.

8 MR. COLLYARD: No objection, Your Honor.

9 THE COURT: P-228 is received.

10 BY MR. SCHAPER:

11 Q. So if you look at the top, Mr. Vanderheyden, this was a
12 subpoena that was directed at the custodian of records at
13 M&I Bank. Do you see that?

14 A. I do.

15 Q. And I'd like you to turn to the second page, and can you
16 describe at a high level the types of documents that this
17 subpoena was requesting.

18 A. These are what would be considered official bank
19 records.

20 Q. So -- and when you say "official bank records," so in
21 terms of the categories, savings account records, checking
22 account records, loan records, safe deposit box records,
23 certificates of deposit and money market certificates, are
24 you saying that those are what you view as official bank
25 documents?

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1 A. Yes.

2 Q. And I don't need to go through each one of them, but on
3 the next page, 0003, treasury notes, credit card records,
4 purchases of bank checks, are those also, in your view,
5 official bank records?

6 A. Yes.

7 Q. Were these types of documents maintained by the IT group
8 that you oversaw?

9 A. No.

10 Q. Were they maintained by some other group within the
11 bank?

12 A. They were.

13 Q. Do you have any reason to believe that M&I did not take
14 steps to comply with this subpoena in 2008?

15 A. I have no reason to believe that.

16 Q. Okay. Could you please turn to P-554. Do you see this
17 document?

18 A. I do.

19 MR. SCHAPER: And this is a document that I
20 believe has already been admitted, Your Honor. It's a court
21 order in a case against Mr. Petters.

22 BY MR. SCHAPER:

23 Q. Mr. Vanderheyden, did you see this document for the
24 first time in preparing for your testimony?

25 A. Yes.

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1 Q. And I'd like to direct your attention to page 9 of the
2 document.

3 A. Okay.

4 Q. Do you see that there's a section called, "Recordkeeping
5 and Business Operations"?

6 A. I do.

7 Q. And if you look towards the end of that first paragraph,
8 do you see that this concerns business, corporate,
9 foundation, banking, financial, and/or accounting records.
10 Do you see that reference?

11 A. I do.

12 Q. And is there a name as how you would describe these
13 types of documents?

14 A. Again, these are all official banking documents.

15 Q. And, again, were these types of documents maintained by
16 your IT group?

17 A. They were not.

18 Q. They were maintained by some other group in the bank?

19 A. Yes.

20 Q. Do you have any reason to believe that M&I did not take
21 steps to comply with this order?

22 A. No.

23 Q. You can put that aside. Thank you.

24 Mr. Vanderheyden, did there come a time when you
25 received or your group received a litigation hold concerning

1 PCI?

2 A. Yes.

3 Q. And just briefly, what is a litigation hold?

4 A. Litigation hold was a document issued by either internal
5 or external counsel that would list the names of the parties
6 who were being asked to hold all their documents. There
7 would be a general reference to a case, and it would
8 basically describe to the folks not to destroy any of their
9 actual printed documents. And we, myself and my team, would
10 be copied on that legal hold.

11 Q. And when did you first receive that hold notice with
12 respect to PCI?

13 A. I believe that was January of 2010.

14 Q. And did your group have a practice regarding retaining
15 documents related to litigations?

16 A. We did.

17 Q. And was the legal hold that you received in January 2010
18 related to PCI the kind of notice that you would deal with
19 under those practices?

20 A. Yes.

21 Q. Did your team take steps to implement that hold notice?

22 A. Yes, we did.

23 Q. What steps did your team take?

24 A. Okay. So based on the names of the parties that were to
25 hold their documents, Number One, we took a copy, generally

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1 on a thumb drive, of everything that was on their personal
2 computer, whether it was a laptop or a work station, and
3 retained that.

4 Secondly, we would go to their -- what we would
5 call network share, where they could save documents on a
6 network file server, and we took a copy of that as well.

7 Also, based on who they were, we could identify
8 what departmental file systems on that file server that they
9 could participate in, and we took copies of that as well.

10 Q. Did there also come a time, Mr. Vanderheyden, when there
11 were searches in the Legato system you've testified about
12 with respect to this hold?

13 A. Yes.

14 Q. Did your team also do anything to look at backup tapes
15 for non-e-mail documents?

16 A. We did. So when we took all of those copies of the
17 personal computer and all of the potential network drives
18 that these people could store documents on, we also backed
19 that -- took a special backup of all of those and held that
20 and, in fact, later searched those.

21 Q. And is it correct that there are different backup tapes
22 for non-e-mail documents than there are for e-mail
23 documents?

24 A. Yes. They are completely separate technologies and
25 systems.

1 Q. And is there a reason that your team searched backup
2 tapes for non-e-mail documents but not backup tapes for
3 e-mails?

4 A. We considered the Legato system our official archive of
5 all of the e-mail activity.

6 Q. Mr. Vanderheyden, would you have taken all of these
7 steps if you wanted to hide documents related to Petters and
8 PCI?

9 MR. COLLYARD: Objection, leading and
10 argumentative.

11 THE COURT: Sustained.

12 BY MR. SCHAPER:

13 Q. Mr. Vanderheyden, why did you take these steps?

14 A. Because it was the right thing to do. It was looking
15 everywhere we could find an electronic document that would
16 have been associated with the people that were so-called
17 custodians or those that were notified that they were on
18 legal hold.

19 Q. Mr. Vanderheyden, have you -- did you ever use backup
20 tapes as a way to retrieve e-mails for litigation?

21 A. Never.

22 Q. By the time that you received this legal hold notice in
23 January 2010, had the server consolidation project you
24 testified about earlier already been planned?

25 A. Yes.

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1 Q. When you received this hold notice, did you ever connect
2 the server consolidation project to the PCI hold notice?

3 A. No.

4 Q. Let me switch topics, Mr. Vanderheyden. Were you aware
5 that there was an effort in 2014 to try to find backup
6 tapes?

7 A. I am.

8 Q. And in your understanding, what time period was the
9 focus of that effort in terms of the dates of the backup
10 tapes?

11 A. Pre-March of 2005.

12 Q. Was there a -- at this point had M&I become BMO Harris
13 in 2014?

14 A. Yes.

15 Q. Was there a BMO Harris --

16 A. Excuse me. No. 2014?

17 Q. Well --

18 A. Yes, yes, yes.

19 Q. So BMO Harris had bought M&I?

20 A. Yeah, yes.

21 Q. Okay. Just want to make sure I don't get the names
22 wrong.

23 Was there a BMO Harris location at which the
24 effort to find backup tapes was focused in 2014?

25 A. Yes, there was.

1 Q. And did people from your IT team conduct a search there?

2 A. Yes, they did.

3 Q. What was the name of that location?

4 A. It was Centre Point. It was an office facility.

5 Q. Where is Centre Point?

6 A. West Allis, Wisconsin.

7 Q. And who on your team undertook that search?

8 A. A gentleman -- a messaging engineer by the name of Dave
9 Scherer.

10 Q. What is your understanding of what Mr. Scherer found?

11 A. He was able to find some backup tapes. He described to
12 me that -- yes, and he reported that back to me.

13 Q. Were any of the backup tapes that he found dated prior
14 to March 2005?

15 A. No.

16 MR. COLLYARD: Objection, lack of foundation.

17 THE COURT: Overruled.

18 THE WITNESS: Should I answer?

19 BY MR. SCHAPER:

20 Q. What was your answer? Yes.

21 A. No.

22 Q. Did you communicate this information about the discovery
23 of tapes to anyone?

24 A. I did.

25 MR. SCHAPER: If we could please put up a document

Vanderheyden - Direct

1 that's already been admitted. It's P-325.

2 BY MR. SCHAPER:

3 Q. Mr. Vanderheyden, if you'd take a look at that, is this
4 the communication that you're talking about?

5 A. Yes, it is.

6 Q. And can you just read -- first of all, this is an e-mail
7 from yourself dated August 26th, 2014; is that right?

8 A. That's correct.

9 Q. And it's to two individuals at the Godfrey law firm?

10 A. That's correct.

11 Q. Can you just read what you wrote there.

12 A. "Dave looked in all the nooks and crannies over there
13 today and found a total of (6) backup tapes from the
14 Minnesota e-mail server. The oldest one was MSP105 labeled
15 'August '07.'"

16 Q. Is the Dave that you reference in the e-mail, is that
17 Mr. Scherer who you just referred to?

18 A. Yes.

19 Q. And what was your intent in writing this e-mail?

20 A. It was to inform our external counsel on this that we
21 didn't -- we were not able to find anything prior to March
22 2005, but we did find some things and reported what we did
23 find.

24 Q. And you said that "The oldest one was MSP105 labeled
25 'August '07,' " correct?

Vanderheyden - Direct

1 A. That's correct.

2 Q. And looking at that e-mail, what does -- what did "MSP"
3 signify to you?

4 A. MSP meant it was Minnesota. For all of those regional
5 servers that were out there, those nine, we used the airport
6 code of the location. So MSP meaning Minneapolis/St. Paul.

7 Q. Were there other prefixes like that for other regional
8 servers?

9 A. Yes, they all did. We had prefixes on all of them, and
10 a couple that were pretty close were MSN, which was Madison,
11 Wisconsin, and MKE, which would have been Milwaukee.

12 Q. And what about August '07, what does that refer to?

13 A. That would have been the month end backup tape from
14 August of 2007.

15 Q. Was it a practice to label backup tapes with the airport
16 code that you just explained and the date?

17 A. Yes.

18 Q. Do you know what 105 refers to?

19 A. 105 is just the directory sequential number generated by
20 the backup software.

21 Q. Do you have any understanding of whether there's a
22 particular standard for that or is that the extent of your
23 understanding?

24 A. That's the extent of my understanding.

25 Q. But you were aware of a practice for MSP and August '07?

1 A. Yes.

2 Q. Mr. Vanderheyden, did you or anyone in your IT group, to
3 your knowledge, do anything further regarding these tapes
4 that were found in 2014?

5 A. No.

6 Q. And why not?

7 A. Well, they were held there. We had them and they were
8 held, but we were not asked at that point in time, I don't
9 believe, to search anything on them.

10 Q. Can you remind us what date -- what kind of tapes, in
11 terms of their dates, were you looking for.

12 A. We were really looking for anything pre-Legato or
13 pre-March 2005.

14 Q. Are you aware of anyone at M&I destroying the backup
15 tapes after they were found at the Centre Point facility in
16 2014?

17 A. No.

18 Q. Mr. Vanderheyden, you just testified that you're
19 familiar with how parts of this MSP105 August '07 label were
20 generated; is that right?

21 A. Yes.

22 Q. And do you have a view on the likelihood that there
23 would be two tapes labeled MSP105 and dated August 2007?

24 A. I don't think it would be possible.

25 Q. All right. So just to wrap up, Mr. Vanderheyden, did

1 you ever ask anyone to destroy documents with the purpose of
2 hiding information about PCI?

3 A. No.

4 Q. Did anyone ever instruct you to do that?

5 A. Absolutely not.

6 Q. At any time did you participate in an effort to do that?

7 A. No.

8 Q. Did you know what was on the backup tapes that were
9 recycled in 2010?

10 A. I did not.

11 Q. Did the server consolidation project that your team led
12 have anything whatsoever to do with Tom Petters or PCI?

13 A. No.

14 MR. SCHAPER: No further questions at this time,
15 Your Honor.

16 MR. COLLYARD: May I proceed, Your Honor?

17 THE COURT: Yes, you may, with cross-examination.

18 **CROSS-EXAMINATION**

19 BY MR. COLLYARD:

20 Q. Good morning, Mr. Vanderheyden.

21 A. Good morning.

22 Q. If we can go back to Exhibit 325, please. I'll put that
23 up. And I just want to go through this e-mail with you too,
24 just so the jury understands and I understand what your
25 testimony was here.

1 This was an e-mail that you sent on August 26th of
2 2014; is that right?

3 A. That's correct.

4 Q. And who are you sending the e-mail to?

5 A. Adam Cares at Godfrey & Kahn, as well as Jonathan
6 Ingrisano at Godfrey & Kahn.

7 Q. And what you do is you say in here, you say, "Dave
8 looked in all the nooks and crannies over there today and
9 found a total of (6) backup tapes." Do you see that?

10 A. I do.

11 Q. You testified earlier that you found some backup tapes,
12 right?

13 A. Correct.

14 Q. The Dave Scherer in the e-mail actually found six,
15 didn't he?

16 A. Yes.

17 Q. And, Mr. Vanderheyden, you have no idea if those tapes
18 exist today, do you?

19 A. Today?

20 Q. Yes.

21 A. No.

22 Q. And you have no idea if they were destroyed immediately
23 after this, do you?

24 A. I don't have any reason to believe they would have been
25 destroyed.

1 Q. For all you knew, they were destroyed after this e-mail,
2 correct?

3 MR. SCHAPER: Objection, argumentative.

4 THE COURT: Sustained.

5 BY MR. COLLYARD:

6 Q. Mr. Vanderheyden, do you know that these tapes were
7 destroyed?

8 A. No.

9 Q. Do you have an understanding as to any court rulings in
10 this case about whether or not these tapes have been
11 destroyed?

12 MR. SCHAPER: Objection, Your Honor,
13 argumentative, prejudicial as to court rulings.

14 THE COURT: Sustained.

15 BY MR. COLLYARD:

16 Q. So you can't testify one way or another whether or not
17 those tapes were in existence or destroyed after 2000 --
18 after August 26th, 2014?

19 MR. SCHAPER: Objection, asked and answered.

20 THE COURT: Sustained.

21 BY MR. COLLYARD:

22 Q. You said -- you say there's one that was labeled August
23 of '07, right?

24 A. Correct.

25 Q. What was the exact label of that tape?

1 A. MSP105 labeled August '07.

2 Q. So the label actually just said "Aug '07"; is that
3 right?

4 A. Yes.

5 Q. Did the label have any more information on it?

6 A. MSP105.

7 Q. Other than that, anything else?

8 A. That would have probably been it.

9 Q. Do you have any idea what the labels were for the other
10 five tapes that Dave Scherer found?

11 A. I do not because we were really looking for anything old
12 and that was the oldest.

13 Q. My question is: Do you have any idea what the labels
14 were for the other five tapes that were found?

15 A. I do not.

16 Q. Did you ever physically see the tapes?

17 A. I did not.

18 Q. So you have absolutely no knowledge of the tapes?

19 MR. SCHAPER: Objection, foundation.

20 MR. COLLYARD: I'm asking him about his knowledge
21 of the tapes.

22 THE COURT: Overruled.

23 BY MR. COLLYARD:

24 Q. You have no knowledge -- I'm sorry, let me back up.

25 You have absolutely no knowledge of the physical

1 tapes, correct?

2 A. I have no reason to believe that Dave would have told me
3 information that was not accurate.

4 Q. Mr. Vanderheyden, what I'm asking you is if you have any
5 knowledge of what the tapes were or if you ever saw them.

6 A. I never saw them physically.

7 Q. And M&I Bank, BMO Harris -- I'm sorry. This was BMO
8 Harris Bank at this time, right?

9 A. Correct.

10 Q. BMO Harris Bank did not search those tapes, did they?

11 A. Not to my knowledge.

12 Q. And so you don't know -- let's start with you first.
13 You don't know of any e-mails that were on those backup
14 tapes, do you?

15 A. No.

16 Q. You can't tell the jury what the content was of any of
17 the information on these six backup tapes, right?

18 A. Correct.

19 Q. And you're not aware of anybody else at BMO Harris Bank
20 that could say what the content of any of those e-mails were
21 on those backup tapes, correct?

22 MR. SCHAPER: Objection, vague as to time.

23 THE COURT: Overruled.

24 THE WITNESS: Should I answer?

25 BY MR. COLLYARD:

1 Q. Yes, please.

2 A. Okay. Well, given the time frame, that that backup tape
3 was August '07, any e-mails that were actually on there that
4 were sent or received post-March 2005 were in the Legato
5 archive, that I can tell you for sure.

6 Q. What I'm asking you, if you know of anybody at BMO
7 Harris Bank who knows what the exact content was of any
8 e-mails on those backup tapes.

9 A. Not -- I don't. Not personally.

10 Q. Let's talk about backup tapes for a moment. Okay?

11 And even if you take the one that is labeled Aug
12 of '07, are you with me?

13 A. Yes.

14 Q. Okay. You understand that backup tapes can have years
15 of information going back, right?

16 A. Absolutely.

17 Q. So that Aug '07 backup tape could contain e-mails that
18 go years back, right?

19 A. Yes.

20 Q. And so it could contain e-mails, for example, that were
21 dated in 2003, right?

22 A. Possible.

23 Q. And it could contain e-mails that were dated in 2004,
24 correct?

25 A. Possible.

1 Q. And the other five backup tapes where there is no label
2 mentioned, all of those backup tapes could have contained
3 information going way back to 2002 or 2003, correct?

4 A. They could, but that same old information would have
5 been on the August '07 tape.

6 Q. What I'm asking you, Mr. Vanderheyden, is if those other
7 backup tapes that are not mentioned could have had e-mails
8 going all the way back to 2003 or 2004?

9 A. Yes.

10 Q. And they could have contained attachments going all the
11 way back from 2003 to 2004, correct?

12 A. Correct.

13 Q. Now, you talked about -- you testified that you were
14 looking for backup tapes that were dated before the
15 implementation of Legato, which was March of 2005; is that
16 right?

17 A. That's correct.

18 Q. Isn't it true, Mr. Vanderheyden, that what you were
19 doing when you were conducting this search is that you were
20 looking for backup tapes created before the implementation
21 of Legato so that you could locate e-mails that were sent or
22 received before M&I had implemented Legato?

23 A. Yes.

24 Q. Okay. So what you were doing -- you weren't looking
25 necessarily just for backup tapes that were labeled after

1 2005, you were looking for backup tapes that contained
2 e-mails that were sent or received before March of 2005,
3 correct?

4 MR. SCHAPER: Objection, misstates the testimony.

5 THE COURT: Overruled. You may answer whether
6 that's correct.

7 THE WITNESS: Yes.

8 BY MR. COLLYARD:

9 Q. Yes. So what you were doing, just to be clear, is you
10 were looking for backup tapes that could have e-mails,
11 e-mails dated before March of 2005, correct?

12 A. Yes.

13 Q. And the reason why you were looking for this is because
14 BMO Harris Bank was involved in another lawsuit in Florida;
15 is that right?

16 A. That's correct.

17 Q. And as a result of that, BMO Harris Bank was being
18 questioned about whether or not any e-mails existed before
19 the implementation of Legato because of the backup tapes
20 that were destroyed in 2010 and 2011; is that also correct?

21 MR. SCHAPER: Objection to form.

22 THE COURT: Overruled.

23 THE WITNESS: Yes.

24 BY MR. COLLYARD:

25 Q. And you agree with me that backup tapes were destroyed

1 in 2010 and 2011, correct?

2 A. Yes.

3 Q. Do you have any idea how many backup tapes were
4 destroyed in 2010 and 2011?

5 A. I do not.

6 Q. Okay. Let's talk about backup tapes again. So we have
7 six backup tapes there. Do you have any idea as to how many
8 pages of e-mails or documents could live on or exist on a
9 backup tape?

10 A. I wouldn't have an actual count, but it would be a lot.

11 Q. It would be a lot, right?

12 A. Yes.

13 Q. We're talking millions of pages of documents, right?

14 A. Probably.

15 Q. We're talking tens of millions of pages, correct?

16 A. Could be.

17 Q. And so is it fair to say, Mr. Vanderheyden, that there
18 could be millions of pages of documents on these backup
19 tapes that were found in August of 2014 that dated back to
20 2003 or 2004?

21 A. It is possible.

22 Q. Go back to the backup tapes that were destroyed in 2010
23 and 2011 real quickly.

24 You're not aware of any e-mails that were on those
25 backup tapes, correct?

1 A. No.

2 Q. So you can't say what the content of any of those
3 potentially millions and millions of pages of e-mails were,
4 correct?

5 A. Right.

6 Q. And you testified that nobody from the bank actually
7 looked at them, right?

8 A. Not to my knowledge.

9 Q. And you also testified that backup tapes could be
10 restored; is that right?

11 A. They could be.

12 Q. They can be brought back to life so you can actually
13 look at them, correct?

14 A. Yes.

15 Q. And that is something that BMO Harris Bank could have
16 done, right?

17 A. Yeah. But as I described, the process to do that would
18 have been basically reading every one of those millions of
19 e-mails to try to find relevant content.

20 Q. I appreciate that, and that wasn't my question.

21 My question was: Was it possible for BMO Harris
22 Bank to go back and restore those backup tapes?

23 A. It was.

24 Q. So that those backup tapes could be read and you could
25 see all the millions of pages of e-mails that were on them,

1 right?

2 A. Yes.

3 Q. That could be done?

4 A. Yes.

5 Q. Okay. Now, you talked about how you're familiar with
6 the legal hold process in litigation, right?

7 A. Correct.

8 Q. And if we back up, let's just describe that a little bit
9 more. Tell me if this is fair. When a party is involved in
10 a lawsuit or they anticipate being involved in litigation,
11 that is when legal hold duties trigger; is that right?

12 A. That's correct.

13 Q. And so your department gets brought in at that point in
14 time to figure out, okay, there's either a lawsuit going on
15 or there might be a lawsuit that's coming up and we've got
16 to figure out how to preserve and keep the information in
17 evidence; is that right?

18 A. That's correct.

19 Q. And that was part of your duties and responsibilities?

20 A. Yes.

21 Q. Now, as part of that, do you understand what unique
22 information is?

23 A. I would assume it's unique, meaning there's only one
24 place or one copy.

25 Q. And have you dealt with, in the context of legal holds,

1 determining how to preserve and keep unique information?

2 A. Could you repeat the question?

3 Q. Sure. In your experience, have you been involved in, in
4 the litigation hold process, trying to determine how to
5 preserve and keep unique information?

6 A. Yes, not specifically just unique information, but
7 information.

8 Q. And do you agree with me that if unique information
9 lives on backup tapes, backup tapes are kept in the course
10 of litigation, correct?

11 A. Generally, yes.

12 Q. And generally they're not destroyed, are they?

13 MR. SCHAPER: Objection to form, vague.

14 THE COURT: Overruled. You may answer.

15 THE WITNESS: Generally they wouldn't be.

16 BY MR. COLLYARD:

17 Q. No, they would be kept so that that unique information
18 could be restored and looked at, correct?

19 A. In general I'd have to say yes, you are correct, but in
20 this case practical to go through millions of e-mails and
21 read each one to determine if it had relevant content, I
22 don't think it was practical.

23 Q. That's not what I'm asking you, Mr. Vanderheyden.

24 A. I realize that.

25 Q. Yeah. What I'm asking you is that the reason why during

1 the course of litigation in your roles and responsibility
2 that that information is preserved and kept is so that
3 unique information, unique evidence can go back and be
4 looked at and found, right?

5 A. Correct.

6 Q. And of course there is a cost to that, correct?

7 A. There is big cost.

8 Q. Okay. And the reason why litigation holds go in place
9 is so that information can be kept so that parties and
10 courts can determine whether that information needs to be
11 looked at, right?

12 A. Yes.

13 Q. That's a fair characterization of that process?

14 A. I would say so.

15 Q. Now, can we please go back to Exhibit 554,
16 Mr. Vanderheyden. And I am going to put that up on the
17 screen. And I'm just going to walk through this with you
18 real quickly because you testified about the content of this
19 document.

20 And if we take a look at this document, can you
21 tell me what this document is.

22 A. It appears to be a form of a legal hold that is ordered
23 by the U.S. District Court.

24 Q. Okay. Tell me if you agree to this. If we go to the
25 very last page of this document, I'll show you, it's page

1 17, and you see a sign there -- a signature by a judge here
2 in the Federal District Court of Minnesota named Ann
3 Montgomery. Do you see that?

4 A. I do.

5 Q. And it's dated October 14th of 2008; is that right?

6 A. That's correct.

7 Q. If we go back and we flip to page 2, do you see at the
8 top there -- I will highlight the top of that for you, and
9 it reads, "Order for Entry of Preliminary Injunction,
10 Appointment of Receiver, and Other Equitable Relief." Do
11 you see that?

12 A. I do.

13 Q. Do you understand that this is a court order?

14 A. Yes.

15 Q. Okay. And go to the part that your counsel asked you
16 about. It's on page 9, and the heading is, "Recordkeeping
17 and Business Operations." Do you see that?

18 A. I do.

19 Q. And this is the part that you testified about, right?

20 A. Correct.

21 Q. And you were asked to interpret the Court's order based
22 on what you understood the documents that the Court was
23 ordering to be kept were, correct?

24 MR. SCHAPER: Objection to form.

25 THE COURT: Overruled.

1 THE WITNESS: That's what this would have
2 indicated.

3 BY MR. COLLYARD:

4 Q. Okay. If we just go through this for a little bit,
5 we'll just start from the top, it says, "IT IS THEREFORE
6 ORDERED that the Defendants; their agents, including
7 financial and banking institutions and other persons having
8 possession or control of the Defendants' assets; their
9 officers; their employees; and all persons in active concert
10 or participating with the Defendants in their affairs must
11 maintain." Do you see that?

12 A. I do.

13 Q. We'll just stop right there and we'll unpack it a little
14 bit.

15 And what that's saying -- what this did was this
16 required M&I Bank at the time, and then later BMO Harris
17 Bank, to keep this information, correct?

18 A. Yes.

19 Q. That's a fair characterization of that?

20 A. It is.

21 Q. And it was ordered by the Court to do that, right?

22 A. Correct.

23 Q. Regardless of cost or whether BMO wanted to have to pay
24 for something, right?

25 A. I would assume so.

1 Q. Okay. So then it says, "Must maintain all business,
2 corporate, foundation, banking, financial, and/or accounting
3 records in their possession that could be material to this
4 cause of action." Do you see that?

5 A. I do.

6 Q. "And are enjoined and restrained from," and then it
7 says, "altering," right?

8 A. Yes.

9 Q. And the next paragraph says "disposing," correct?

10 A. Yes.

11 Q. And what that was telling the bank is that the bank was
12 ordered to not alter, destroy, or dispose of any of this
13 type of information, correct?

14 A. Correct.

15 Q. Now, your counsel asked you to interpret some of the
16 Court's words here, so I just want to make sure we're on the
17 same page.

18 Where it says all business records in Part A, do
19 you see that?

20 A. I do.

21 Q. It says, "Any business," and then it says, "records in
22 their possession that could be material." Do you see that?

23 A. Yes.

24 Q. You agree, Mr. Vanderheyden, that e-mails fall into
25 these categories of information, do you not?

1 A. Well, those items identified specifically are all what I
2 would have considered earlier official bank records.

3 Q. Mr. Vanderheyden, where it says -- it says, "Maintain
4 all business, corporate, banking, financial, accounting
5 records in their possession," you would agree with me that
6 that would include e-mails, right?

7 MR. SCHAPER: Objection, asked and answered.

8 THE COURT: Overruled. You may answer.

9 THE WITNESS: Okay. So could you repeat it just
10 so I can --

11 BY MR. COLLYARD:

12 Q. Yes. I'm just asking you if here where the Court is
13 requiring the bank to maintain all business, corporate,
14 banking, financial, and accounting records in their
15 possession, if that could include e-mails.

16 A. It could.

17 Q. And then it says that the bank was enjoined or
18 restrained from altering any business, corporate, financial,
19 accounting records in their possession, and that could
20 include e-mails too, right?

21 A. If you made that assumption from the first statement,
22 yes.

23 Q. Well, you agree with me, right?

24 A. Yeah. Yeah.

25 Q. Yes?

1 A. Yes.

2 Q. And then the bank has enjoined and restrained -- I'm
3 sorry. The Court has enjoined and restrained the bank from
4 disposing of any business records, and that includes e-mails
5 as well, correct?

6 A. It could.

7 MR. SCHAPER: Objection to the form.

8 THE COURT: Overruled.

9 THE WITNESS: Yes.

10 BY MR. COLLYARD:

11 Q. Now, did I hear you correctly that you had never seen --
12 did you see this order before?

13 A. I saw this I believe in 2017 for the first time.

14 Q. And in your roles and responsibilities, were you
15 supposed to get court orders like this that required the
16 bank to not destroy or alter, for example, e-mails that the
17 bank had?

18 A. I was not supposed to. We acted on the legal holds
19 issued by corporate or external counsel, not by these.

20 Q. You said that you got a legal hold in January of 2010;
21 is that right?

22 A. That's correct.

23 Q. Was that the first time you got a legal hold?

24 A. Yes.

25 Q. What did that legal hold say?

1 A. It said -- it listed again the names of the folks that
2 were involved and told them not to destroy their documents,
3 which triggered us to get a copy of all of their electronic
4 documents.

5 Q. You got that legal hold before the backup tapes were
6 destroyed in 2010 and 2011, right?

7 A. It's possible, yes.

8 Q. Well, you got it in January --

9 A. Yeah.

10 Q. -- of 2010 is what you testified to, right?

11 A. Correct.

12 Q. So you got that legal hold before the bank went ahead
13 and destroyed the potentially millions and millions of pages
14 of documents in 2010 and 2011, correct?

15 A. We had no idea what the time frame of keeping this was
16 at that point in time, so we had the Legato archive at that
17 point for almost six years.

18 Q. We'll talk about Legato in a second, but what my
19 question is is you got -- you received the legal hold in
20 January of 2010 and that was before the time that the bank
21 went ahead and destroyed all those millions of pages in 2010
22 and 2011, correct?

23 A. It's possible, yes.

24 Q. In fact, you started destroying --

25 A. Yes.

1 Q. -- the documents in 2010 and 2011 in September of 2010;
2 is that right?

3 A. That sounds right.

4 Q. So you had the legal hold nine months beforehand, right?

5 A. Correct.

6 Q. And the reason why you're on the legal hold is because
7 your group is responsible for making sure that e-mails and
8 things like backup tapes, if they need to be preserved for
9 litigation, are preserved, right?

10 A. That's correct, but the legal hold never specified the
11 start time of the information in question; and we had,
12 again, six years' worth of every e-mail sent and received,
13 not just a copy of backup tapes.

14 Q. My question -- I'm sorry, Mr. Vanderheyden.

15 A. So that was, in our mind, the official record.

16 Q. My question, Mr. Vanderheyden, was: It was your role
17 and responsibility in getting the legal hold to ensure that
18 information was kept and preserved, correct?

19 A. Yes, based on what I would read out of a legal hold, I
20 would take every action possible.

21 Q. And you can't say, Mr. Vanderheyden, for a fact that
22 there was not unique information on all those millions of
23 pages of documents that were destroyed from those backup
24 tapes in 2010 and 2011, right?

25 A. I cannot say that for --

1 Q. You can't. So what we can say is that there could have
2 been unique information on all of those millions of pages of
3 evidence and e-mails that were destroyed, right?

4 A. Could have been.

5 Q. Let's go back to some other questions your counsel asked
6 you in Exhibit 228 -- I'll pull that up for you -- and this
7 was that subpoena that you had talked about.

8 If we turn to page 3, please, Mr. Vanderheyden, I
9 believe it was under the "Other Records" portion. We'll
10 look at that. We'll focus on the second paragraph
11 underneath that I think is where you were asked questions.
12 Do you remember that?

13 A. I do.

14 Q. And it says, "All correspondence with the above
15 persons/entities and/or with third parties regarding the
16 above persons/entities." Do you see that?

17 A. I do.

18 Q. And then it goes on and explains, "All memoranda, notes,
19 files, records relating to meetings or conversations
20 concerning the above persons/entities." Do you see that?

21 A. I do.

22 Q. Now, certainly you agree, Mr. Vanderheyden, that that
23 includes e-mails, right?

24 A. It would.

25 Q. Let's go to -- let me change. Let's go to Plaintiff's

1 Exhibit 787. Can you tell me what this is,
2 Mr. Vanderheyden.

3 A. This is a summary of the M&I, still would have been M&I,
4 I believe, records management policy.

5 Q. Is this a records management policy that you were
6 involved in creating or implementing?

7 A. I had input into it, yes.

8 Q. What is the date of this policy?

9 A. January 15th, 2009.

10 Q. So this is January 15th of 2009. So more than a year
11 before M&I Bank started destroying the backup tapes from
12 2010 and 2011; is that right?

13 A. Yes.

14 Q. I just want to take a look at -- let me ask you some
15 more questions about it and lay some foundation here. You
16 had input into this policy?

17 A. I did. I did.

18 Q. You're familiar with it?

19 A. Yes.

20 Q. You understand what's being conveyed in this policy?

21 A. Yes.

22 MR. COLLYARD: I offer Plaintiff's Exhibit 787,
23 Your Honor.

24 MR. SCHAPER: No objection, Your Honor.

25 THE COURT: Exhibit 787 is received, Plaintiff's

1 Exhibit.

2 BY MR. COLLYARD:

3 Q. Can we please turn to page 3, Mr. Vanderheyden. I just
4 want to ask you something here.

5 A. Okay.

6 Q. You go to that Section VI, "Legal Holds and The Duty to
7 Preserve Records." Do you see that?

8 A. I do.

9 Q. Let's just take a look at this. On the -- I'll just
10 have to go through it first. It says, "There are certain
11 circumstances where M&I may have a legal obligation to
12 retain Records that may some day become evidence in a legal
13 proceeding or government investigation." Do you see that?

14 A. I do.

15 Q. And it says, "This legal obligation is known as the
16 'duty to preserve.'" Do you see that?

17 A. I do.

18 Q. And the duty to preserve is what we were talking about
19 earlier for why legal holds or litigation holds get
20 implemented, right?

21 A. That's correct.

22 Q. The whole purpose of that is to make sure that evidence
23 is kept for real litigation or in anticipation of
24 litigation; is that right?

25 A. Yes.

1 Q. And then it says, "It supersedes the Records Disposal
2 Instructions outlined in this Policy." Is that right?

3 A. That's right.

4 Q. And so is what your policy saying here is that the legal
5 hold is what's important?

6 A. Yes.

7 Q. And the legal hold supersedes any records management
8 policy that the bank has, right?

9 A. Correct.

10 Q. The legal hold overrides or supersedes any policy,
11 right?

12 A. Correct.

13 Q. And that would be the legal hold that you're talking
14 about that you got in January of two thousand and --

15 A. Ten.

16 Q. -- ten, right?

17 A. Correct.

18 Q. And so when you got the legal hold in January of 2010,
19 what this policy says is that legal hold overrode any other
20 document management policy that was in place at the bank,
21 correct?

22 A. Correct.

23 Q. Go back to Defendant's Exhibit 7000? So it's DX-70000.
24 And if we take a look at the second page so we can see what
25 it was about, this was your "Lotus Notes Upgrade/Refresh."

1 Do you remember talking about this?

2 A. Yes.

3 Q. Was this -- do I understand that what your testimony was
4 is that this was the consolidation -- this really outlined
5 your consolidation project is what you were talking about?

6 A. That's correct.

7 Q. And this was -- this PowerPoint here was meant to
8 discuss or describe the important aspects of your project?

9 A. Correct.

10 Q. Where in this PowerPoint does it mention anything about
11 backup tapes?

12 A. It's not mentioned.

13 Q. Where in this PowerPoint does it mention how this
14 project could impact the existence of backup tapes that may
15 be subject to legal matters?

16 A. It's not part of this presentation.

17 Q. I think you told -- I think it was yesterday you
18 testified that the reason why Legato went into place was
19 because of requirements to keep records for six years; is
20 that right?

21 A. Specifically for broker-dealers.

22 Q. And that was -- and under the broker-dealer laws -- I
23 think you said because of broker-dealer laws, the bank is
24 required to keep information for six years, right?

25 A. Yes.

Vanderheyden - Cross

1 Q. Let's look at another document of yours. Let's look at
2 Plaintiff's Exhibit 791.

3 And, Mr. Vanderheyden, can you please just tell me
4 what that document is.

5 A. If I'm looking at the right one, it's labeled "Backup
6 Operation and Retention Standard"?

7 Q. That's correct.

8 A. Okay. Yes.

9 Q. What is that document?

10 A. This is a document that describes our standard practice
11 solidified now and put in writing in terms of what we would
12 back up and how long we would retain it, how we would label.

13 Q. You're familiar with this document?

14 A. I am.

15 Q. Did you have input into these policies or procedures?

16 A. Yes.

17 Q. And what's --

18 MR. COLLYARD: I'll offer Plaintiff's Exhibit 791,
19 Your Honor.

20 MR. SCHAPER: No objection.

21 THE COURT: Exhibit 791 is received.

22 BY MR. COLLYARD:

23 Q. We'll just pull it up here and take a look at it. And
24 just look at the top where it says, "Purpose," just so we
25 can understand it. It says, "This standard outlines the

1 requirements for backup operations and tape retention of M&I
2 data." Do you see that?

3 A. I do.

4 Q. And what does that mean?

5 A. Exactly what it says. It outlines the standards and the
6 requirements.

7 Q. To keep backup tapes?

8 A. Yes.

9 Q. And then the next paragraph below says, "Scope" and it
10 says -- I'm sorry, I'm going to go to the next paragraph.
11 There we go. It says, "Scope," and it says, "This standard
12 applies to all information processed and stored on M&I-owned
13 equipment and that is backed up to the backup and
14 disk-to-disk backup systems managed by Information
15 Technology Services." Do you see that?

16 A. I do.

17 Q. And the Information Technology Services is you, right?

18 A. Correct.

19 Q. What's the date of this document? If you look down in
20 the bottom left-hand corner, do you see that it's July 22nd
21 of 2010?

22 A. I do.

23 Q. So this is seven months after you received the legal
24 hold in this case, correct?

25 A. Correct.

1 Q. Or I'm sorry. This is seven months after you received
2 the legal hold pertaining to Petters matters; is that right?

3 A. Yes.

4 Q. And if we go to the next page, page 2, we're going to go
5 to the paragraph right above where it says, "Definitions."
6 It says, "An annual (January monthly backup) tape set will
7 be pulled from the monthly tape set and stored at the
8 designated off-site facility for a minimum of," and then it
9 says, "7 years." Do you see that?

10 A. I do.

11 Q. And so these backup tapes were to be stored and kept for
12 seven years; is that right?

13 A. That's correct.

14 Q. If we go back to -- I'm sorry. The date of your
15 presentation that we talked about earlier, that was -- was
16 that --

17 A. February 2010.

18 Q. That was February of 2010. Okay. So this is dated
19 after your presentation, right?

20 A. Yes.

21 Q. So you give the presentation and you're going to put in
22 your consolidation efforts and then you come out with a
23 retention policy that says backup tapes are stored for seven
24 years, right?

25 A. Yes.

1 Q. And why did you come out with a policy to keep backup
2 tapes for seven years?

3 A. Seven years was just an industry standard. Specifically
4 official bank records, seven years.

5 This policy that we're looking at at the present,
6 the true focus of this was on those file servers that had
7 the information that people could store them on. That was
8 truly the focus of this, although it does not preclude
9 e-mail.

10 Q. And, in fact, it does include e-mail backup tapes,
11 correct?

12 A. Well, it does say all.

13 Q. Well, you wrote the policy. You know --

14 A. Yes.

15 Q. I'm sorry, Mr. Vanderheyden. Sorry. You know that this
16 policy to keep these backup tapes for seven years does
17 include the backup tapes that have e-mails on them, correct?

18 A. Correct.

19 Q. And those backup tapes were supposed to be kept for
20 seven years, right?

21 A. Yes, as of January of 2022 -- or January of 2010, yes.

22 Q. I'm sorry. As of July --

23 A. July of 2010, excuse me.

24 Q. July of 2010, correct?

25 A. Yes.

1 Q. And the bank started destroying backup tapes after that
2 in September of 2010, correct?

3 A. Possible, yes. I guess so. Yeah.

4 Q. Am I right or am I wrong?

5 A. I guess you're right. I think you're right.

6 Q. You said as well -- we can take that down.

7 You said something along the lines of Legato
8 creates -- is it a perfect archive or a perfect image?

9 A. That's correct.

10 Q. And so Legato supposedly keeps an exact replica of what
11 the documents are; is that right?

12 A. That's correct.

13 Q. Let me show -- let's go to Plaintiff's Exhibit 788 and I
14 just have a question for you.

15 This is an e-mail that you are on that you were
16 sent on September of 2009, correct?

17 A. Yes.

18 Q. And you agree with that?

19 A. I do.

20 Q. You received this e-mail?

21 A. I do.

22 MR. COLLYARD: I offer Plaintiff's Exhibit 788,
23 Your Honor.

24 MR. SCHAPER: No objection, Your Honor.

25 THE COURT: Exhibit 788 is received.

1 BY MR. COLLYARD:

2 Q. And if we just focus on the top, is that an e-mail from
3 Cathy Klitzka at M&I Corp. Do you see that?

4 A. I do.

5 Q. And it's dated again September 2009, right?

6 A. That's correct.

7 Q. So this is when M&I is M&I, right?

8 A. Yes.

9 Q. M&I is not BMO at this point in time, is it?

10 A. No, it is not BMO officially, no.

11 Q. Well, it's not BMO at all at this point in time, is it?

12 A. No.

13 Q. Not officially, not unofficially. It's M&I, right?

14 A. M&I.

15 Q. Okay. And this e-mail -- this is an e-mail that was
16 from the Legato system, correct?

17 A. Correct.

18 Q. And your address there says, "john.vanderheyden@bmo,"
19 right?

20 A. It does.

21 Q. This is not an exact replica of the e-mail -- or, I'm
22 sorry. Let me back up.

23 Legato did not capture a perfect image of the
24 exact e-mail that existed in September of 2009, did it?

25 MR. SCHAPER: Objection, foundation.

1 THE COURT: Overruled. You may answer.

2 THE WITNESS: I can't say that what it captured
3 versus what it retrieved at whatever point in time this was
4 retrieved from Legato.

5 So let me say it this way: The e-mail that was
6 captured to Legato most likely was to me at M&I corp. By
7 the time it was pulled out of, to create this document, the
8 Legato archive, it's quite possible that the parameters were
9 changed or were in the process of being changed because that
10 domain had changed by that time. So this probably was
11 pulled after the BMO acquisition.

12 BY MR. COLLYARD:

13 Q. So if we wanted to see what the exact document was, what
14 the exact e-mail was on Legato that you claim kept this
15 perfect image of everything and if we wanted to see that
16 e-mail from September of 2009, this e-mail would not be an
17 exact replica of the e-mail that existed on September 28th
18 of 2009; am I correct?

19 A. Yes. I can't argue that, no.

20 Q. Right. And you agree that Legato failed in that
21 respect, didn't it?

22 A. I can't really say that. I don't know what was really
23 in Legato. I can see what Legato output. Did the output
24 change that domain name to BMO? That I don't know. This
25 one I cannot explain.

1 Q. Sure. And this is just one example, correct?

2 A. It is one example.

3 Q. And if we wanted to get the exact replica to see what
4 the exact e-mail looked like back in 2009, would we have to
5 go to a backup tape?

6 MR. SCHAPER: Objection to form --

7 THE COURT: Overruled.

8 MR. SCHAPER: -- foundation.

9 THE COURT: Overruled.

10 THE WITNESS: Backup tape would have been another
11 source.

12 BY MR. COLLYARD:

13 Q. And, in fact, the backup tape would actually have the
14 exact e-mail, the exact replica, correct?

15 A. Most likely, yep.

16 Q. And that would have been a better version than what
17 Legato had, right?

18 A. Well, with the exception of that domain name changing as
19 a result of the acquisition in progress or whenever this was
20 pulled at the time, everything else on that e-mail is the
21 exact replica.

22 Q. Mr. Vanderheyden, I understand, but that's not what I am
23 asking you.

24 A. The time, the date, the subject line, the body, and then
25 if there were attachments, it would have been.

Vanderheyden - Redirect

1 Q. What I'm asking you, if I wanted to see the exact
2 replica, the best evidence of what the e-mail was on
3 September 28th of 2009 to see how it really existed in life,
4 I would have to go to the backup tape, right?

5 MR. SCHAPER: Objection, asked and answered and
6 argumentative.

7 THE COURT: Overruled.

8 THE WITNESS: Yes.

9 MR. COLLYARD: No further questions, Your Honor.

10 THE COURT: Cross-examination [sic]?

11 MR. SCHAPER: Thank you, Your Honor. If we can
12 put up P-325.

13 **REDIRECT EXAMINATION**

14 BY MR. SCHAPER:

15 Q. Are you there, Mr. Vanderheyden?

16 A. I am.

17 Q. Mr. Vanderheyden, when your IT group was looking for
18 e-mails in this 2014 time frame and looking for backup tapes
19 in particular, what was the date range of the backup tapes
20 that was the focus?

21 A. We were specifically looking for pre-March 2005 tapes.

22 Q. And as you understand it, were any pre-March 2005 tapes
23 found?

24 A. There were not. The oldest was August '07.

25 MR. SCHAPER: Okay. We can take that down.

1 BY MR. SCHAPER:

2 Q. Mr. Vanderheyden, you were asked some questions about
3 the use of e-mail backup tapes for litigation purposes.

4 At M&I, in your recollection, did you ever use
5 e-mail backup tapes for litigation purposes?

6 A. Never.

7 Q. And in the 2010 time frame, if you needed to produce
8 e-mails in a litigation or save them, what system did you
9 rely on for that?

10 A. We went to the Legato archive.

11 Q. If we put up P-554 and go to page 9, do you recall being
12 asked about this language?

13 A. Yes.

14 Q. And when you first saw this document, Mr. Vanderheyden,
15 how did you interpret business, corporate, foundation,
16 banking, financial records? What did you consider that a
17 reference to?

18 A. Again --

19 MR. COLLYARD: Objection, Your Honor, cumulative
20 and asked and answered.

21 THE COURT: Overruled.

22 THE WITNESS: Again, these are what I would
23 describe as official banking records.

24 BY MR. SCHAPER:

25 Q. And did your department maintain those?

1 A. We did not.

2 MR. SCHAPER: If we would please, Mr. Herzka, if
3 you would pull up P-787?

4 BY MR. SCHAPER:

5 Q. Do you recall being asked about this document by
6 plaintiff's counsel?

7 A. Yes.

8 Q. And plaintiff's counsel took you through to Section VI,
9 and I'd like to direct your attention to Section VII and
10 it's labeled "E-Mail Retention." Do you see that?

11 A. I do.

12 Q. And it says that, "All e-mail messages sent and received
13 via the corporate Lotus Notes system will be retained in an
14 Authorized Repository." Do you see that?

15 A. I do.

16 Q. What's your understanding of what authorized repository
17 refers to?

18 A. That is Legato.

19 Q. And as far as you know, were any e-mails in the Legato
20 system deleted or destroyed at any time during this time
21 period?

22 A. No.

23 Q. Was that even possible to do that?

24 A. That would have been impossible to do.

25 Q. You testified that when there was a search for backup

1 tapes in 2014, the oldest one that was found had a label
2 dated August 2007. Do you recall that testimony?

3 A. Yes.

4 Q. If that tape eventually had been restored, is it
5 possible that that tape would contain pre-2005 e-mails?

6 A. It is possible, yes.

7 Q. As part of the server consolidation project,
8 Mr. Vanderheyden, did there come a time when the project was
9 deemed to be successful?

10 A. Yes.

11 Q. And was that because the servers actually had been fully
12 consolidated?

13 A. Correct.

14 Q. And why was there a decision to recycle backup tapes --
15 e-mail backup tapes at that time?

16 A. Well, the tape format itself that was used on those
17 regional servers wasn't the same tape format that was used
18 in newer technology that we purchased, so I don't believe we
19 even had the capability to read them ourselves. So we would
20 have had to send them out to some third party in order to
21 have them read those tapes.

22 Q. At the time that decision was made in 2010, did you have
23 an understanding or belief that e-mails had been retained
24 within M&I?

25 A. Yes.

1 Q. And on what system were they retained?

2 A. Legato.

3 Q. To the extent that e-mails before 2005 were not
4 retained, could that have been a mistake?

5 A. Rephrase the question. I --

6 Q. If it turned out that e-mails from before 2005 were not
7 retained, could that have been a mistake?

8 A. Possibly.

9 Q. I would just like to direct your attention back to
10 Defendant's Exhibit 70000.

11 Mr. Vanderheyden, with regard to all of the
12 testimony that you have been giving this morning about the
13 consolidation project and the fact that some tapes were
14 ultimately recycled, does that all relate to the fact that
15 there was this server consolidation in the first place?

16 A. That's what it was all about.

17 Q. And did this server consolidation project -- you led it,
18 correct?

19 A. Correct.

20 Q. And did this have anything whatsoever to do with
21 Mr. Petters or PCI?

22 A. No. In fact, it started well before we were even aware
23 of any of this.

24 Q. Did it have anything to do with this lawsuit?

25 A. No.

1 MR. SCHAPER: No further questions, Your Honor.

2 **RECROSS-EXAMINATION**

3 BY MR. COLLYARD:

4 Q. I'm sorry, Mr. Vanderheyden. Did you just say that your
5 consolidation project from 2010 happened well before the
6 bank was aware of the Petters matters?

7 A. It was well before my team was aware of the matter,
8 which would have been the legal hold issued on January of
9 2010.

10 Q. The consolidation project happened and was implemented
11 after the litigation hold?

12 A. No. The consolidation project started in June of the
13 prior year, 2009, and that was driven by the fact of
14 out-of-date software.

15 Q. And the consolidation project happened after the
16 litigation hold went in in January of 2010, correct?

17 A. It completed after. It didn't start after.

18 Q. And if you go back to Exhibit 554, please, and just so
19 we're clear as to what the bank knew, this court order was
20 dated in October of 2008, if we go to page 17, correct?

21 A. Correct.

22 Q. And that was well before the consolidation project ever
23 came about, right?

24 A. I didn't see this document until 2017, but, yes.

25 Q. Okay. And, in fact --

1 A. The specific answer is yes.

2 Q. Okay.

3 A. But our awareness wasn't until 2017.

4 Q. Your awareness?

5 A. My awareness.

6 Q. Not the bank's awareness?

7 A. Correct.

8 Q. And if we go to page 9 real quickly of this document,
9 and you keep saying that you interpret this to be official
10 bank records of what the Court was ordering the bank to
11 keep, right?

12 A. Correct.

13 Q. And you agree, once again, that this includes e-mails,
14 right?

15 A. Yes, it does, but the focus here -- I mean, the things
16 that are specified here are --

17 Q. Mr. Vanderheyden, my question is --

18 MR. SCHAPER: Can he let the witness please answer
19 the question, Your Honor. Let the witness finish his
20 answer.

21 THE COURT: Is that an objection?

22 MR. SCHAPER: It's an objection to interrupting
23 the witness.

24 THE COURT: Sustained.

25 THE WITNESS: May I continue? Okay.

1 No, I mean the items that are listed on here are
2 officially -- they are official bank records. It does --
3 I'm not going to say it would exclude things beyond that,
4 but it seemed that the spirit of that sentence is around
5 official bank records.

6 BY MR. COLLYARD:

7 Q. My question now, Mr. Vanderheyden, is: This encompasses
8 e-mails, doesn't it?

9 A. It does.

10 Q. And e-mails are bank records, aren't they?

11 A. I can't answer that question.

12 Q. Okay. Your testimony is that e-mails may not be bank
13 records?

14 A. In the world of official banking records, it is not
15 accounting records, it's not deposits, it's not loans. It's
16 correspondence, so.

17 Q. E-mails are correspondence?

18 A. E-mails are correspondence.

19 Q. Correspondence are bank records, right?

20 A. You could interpret it that way, but...

21 Q. You interpret it that way as well, don't you?

22 A. Again, I've looked at these categories and say there's
23 official banking documents, which we did not maintain. We
24 maintained the e-mail applications --

25 Q. Mr. Vanderheyden --

1 A. -- and correspondence.

2 Q. Mr. Vanderheyden, in all the time that you spend dealing
3 with legal holds and figuring out what information to keep
4 in your regular job on a regular basis, you include e-mails
5 as bank records, don't you?

6 A. We include --

7 MR. SCHAPER: Objection, asked and answered.

8 THE COURT: Overruled.

9 THE WITNESS: We include e-mail as bank documents,
10 but not official bank records, if that helps.

11 BY MR. COLLYARD:

12 Q. And in all the times that you're involved in legal holds
13 and making sure that people don't destroy evidence, that
14 includes e-mails, correct?

15 A. Yes.

16 Q. Now, just to put another point on this, you don't -- you
17 weren't asked to interpret this document for anything with
18 respect to the bank, were you?

19 A. I didn't see this document until 2017.

20 Q. Your counsel asked you to interpret it; is that right?

21 MR. SCHAPER: Objection, Your Honor.

22 THE COURT: Overruled.

23 THE WITNESS: I guess.

24 BY MR. COLLYARD:

25 Q. You didn't interpret this document in the normal course

1 of your job at all, did you?

2 A. I actually didn't see this document in the normal course
3 of my job.

4 Q. So do you agree with me?

5 A. Repeat the statement.

6 Q. Yes. You did not interpret this document in the normal
7 course of your job at all, did you?

8 A. No.

9 Q. And, in fact, when you receive legal holds, you don't
10 interpret the information that is supposed to be kept or
11 preserved, right?

12 A. Yes and no. So given the folks that were named as the
13 custodians for the legal hold, those people that were told
14 to maintain their records, we, as a value-added service to
15 that, based on our setup of where they could store documents
16 on those department shares and on their individual user
17 shares, we would go find all of those.

18 Q. I --

19 A. Those were not specified within the parameters of the
20 legal hold itself.

21 Q. I get that. What I'm -- that is completely fair. What
22 I am talking about is the parameters of what is being told
23 to be kept and preserved. That is not determined by your
24 group, that is determined by, for example, the legal group?

25 A. That's correct.

1 Q. Thank you, Mr. Vanderheyden.

2 A. Thank you.

3 MR. COLLYARD: No more questions, Your Honor.

4 MR. SCHAPER: No more questions, Your Honor.

5 THE COURT: Sir, you are excused.

6 We will have our midmorning break now. Please be
7 prepared to come back to the courtroom at 10:45, Members of
8 the Jury, and please be mindful and continue to abide by the
9 instructions that I have given you regarding this case and
10 your duties as jurors. Okay? Thank you.

11 (Jury excused)

12 **IN OPEN COURT**

13 **(JURY NOT PRESENT)**

14 THE COURT: We are in recess.

15 (Recess taken at 10:28 a.m.)

16 * * * * *

17 (10:45 a.m.)

18 **IN OPEN COURT**

19 **(JURY PRESENT)**

20 THE COURT: Please be seated.

21 MR. GLEESON: Good morning, Your Honor. For our
22 next witness, BMO Harris Bank calls Deanna Coleman.

23 THE COURT: Thank you.

24 COURT REPORTER: Please come forward and stop in
25 front of me. Would you raise your right hand to be sworn,

1 please.

2 (Witness sworn)

3 COURT REPORTER: You can have a seat in the
4 witness stand. Speak into the microphone and state your
5 name, spelling your first and last name, please.

6 THE WITNESS: Deanna Lynn Coleman; D-e-a-n-n-a,
7 C-o-l-e-m-a-n.

8 THE COURT: Ms. Coleman, good morning. Would you
9 please pull the base of the microphone a little closer to
10 you so that we can make sure we hear you. Thank you.

11 THE WITNESS: Yes.

12 THE COURT: Counsel, you may proceed.

13 MR. GLEESON: Thank you, Your Honor.

14 **(Deanna Coleman)**

15 **DIRECT EXAMINATION**

16 BY MR. GLEESON:

17 Q. Good morning, Ms. Coleman.

18 A. Good morning.

19 Q. You worked with Tom Petters at PCI?

20 A. I did.

21 Q. Okay. And were you an officer of PCI?

22 A. Yes.

23 Q. Okay.

24 MR. GLEESON: Judge, can I approach? Sorry.

25 There's one thing I neglected to mention.

1 THE COURT: You may.

2 **(At sidebar)**

3 THE COURT: Counsel, we are going to refrain from
4 our normal practice of having frequent sidebars.

5 MR. GLEESON: Definitely.

6 THE COURT: I think I have advised you of that.

7 MR. GLEESON: I just neglected to say I'm calling
8 her [inaudible].

9 THE COURT REPORTER: Excuse me. Calling her?

10 MR. GLEESON: Forgive me. Calling her adverse.

11 MR. ANTHONY: I don't think you can say she's
12 adverse to him. He's calling her in direct in his case, and
13 I am entitled to cross.

14 THE COURT: Agreed.

15 MR. GLEESON: Judge, all -- they called all of our
16 witnesses adverse even though they were calling them on
17 direct.

18 This is an officer of the company in whose shoes
19 Mr. Kelley stands, and it's adverse in that respect. It's
20 the officer of PCI.

21 The fact that I'm calling her doesn't alter that
22 fact. Just as when they called the bank employees and bank
23 officers in their direct, they called them adverse.

24 THE COURT: Okay. And by calling them adverse,
25 that means you are seeking to do what?

1 MR. GLEESON: I am just seeking to ask leading
2 questions.

3 MR. ANTHONY: I object. I object to that,
4 Your Honor. We have had a problem with leading questions
5 throughout this case.

6 THE COURT: I will allow you to ask leading
7 questions. If there are objections as to the
8 appropriateness of the question, not the manner and form of
9 the question, I will rule on the objection and --

10 MR. ANTHONY: My --

11 THE COURT: -- expect an objection.

12 MR. ANTHONY: My concern, Your Honor, is a leading
13 question oftentimes has facts embedded in the question.

14 So even if objectionable -- for example, if he
15 asks her, Did you tell the FBI that M&I Bank knew about this
16 fraud, that might be objectionable, but it's already out
17 there. That's the problem with a leading question when it's
18 sought to solicit/elicit testimony about someone else's
19 knowledge. It's too late once it's asked. That's my
20 concern.

21 THE COURT: And how is that different than the
22 ruling that I gave to your -- the parties across the way as
23 to witnesses called adversely?

24 MR. ANTHONY: It's only different in the sense
25 that I don't think she's associated with either party.

Coleman - Direct

1 Mr. Kelley is not in her shoes. He's the receiver and the
2 trustee. He's not an officer of PCI, and, for that reason,
3 she's in an entirely different position.

4 Allowing her to be led, which Mr. Gleeson is very
5 capable at doing, will expose us to being unfairly
6 prejudiced under Rule 402 and 403 in our ability --
7 inability to object. So that's my objection.

8 MR. GLEESON: First of all, I apologize for the
9 sidebar.

10 Second of all, I heard your admonition. I think I
11 respectfully suggest we play it by ear. I'm going to ask
12 fair questions, but it is a -- in the same way that the M&I
13 employees were allowed to be questioned or the right to be
14 treated as adverse.

15 Ms. Coleman, because of her position at PCI, and
16 this is a claim brought on behalf of PCI, I should be
17 afforded the same opportunity. I assure the Court I will
18 not abuse it.

19 MR. ANTHONY: My only question -- observation is
20 that I would ask that he not be allowed to ask her what some
21 other party knows about the fraud.

22 For example, asking her whether the bank knew
23 about the fraud or any employee in the bank knew of the
24 fraud should be off limits. She can't testify to what's in
25 someone else's head, nor can she -- there's that whole

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1 nonverbal hearsay issue under 802. And any
2 communications --

3 THE COURT: So your objection has meandered.

4 MR. ANTHONY: Okay. My objection now is he should
5 not be permitted to ask her about the knowledge of any other
6 person. She can only testify as to what she said, what she
7 heard. She can't say, for example --

8 MR. GLEESON: I agree with all of that. I'm sorry
9 to interrupt. I agree with that.

10 MR. ANTHONY: So he's not going to ask about the
11 knowledge of other people. As long as that's the ground
12 rules, I understand that.

13 MR. GLEESON: I am going to ask about things that
14 she perceived, what people said to her, what she said to
15 them. And I'm not going to ask what was in people's heads.

16 MR. ANTHONY: What she perceived is different than
17 what she said and what was said to her. What she perceived
18 is her opinion about what someone else thought.

19 As long as he's not asking for her opinion about
20 what others thought, I'm okay with what she said and what
21 she heard.

22 MR. GLEESON: I don't disagree.

23 THE COURT: Does everyone understand the ground
24 rules?

25 MR. GLEESON: Yes.

1 THE COURT: Okay. Now, let's be clear, I want to
2 address these things outside of the presence of the jury.
3 Okay?

4 MR. ANTHONY: Pardon me, Your Honor?

5 THE COURT: I said I want to address these things
6 outside of the presence of the jury. We just had a break,
7 we just come back in, and now we're spending time at
8 sidebar.

9 MR. GLEESON: I apologize for that.

10 THE COURT: Okay. So just moving forward, notice
11 to both.

12 **(In open court)**

13 MR. GLEESON: Thank you, Your Honor.

14 THE COURT: You're welcome. Counsel, you may
15 proceed. Good morning.

16 BY MR. GLEESON:

17 Q. I think when we broke, I asked you whether you were an
18 officer of PCI. Were you?

19 A. Yes.

20 Q. And you were involved in the Ponzi scheme at PCI from
21 its inception; is that fair to say?

22 A. Yes.

23 Q. And that was approximately when, Ms. Coleman?

24 A. Since day one.

25 Q. Okay. Is that roughly 1994?

1 A. Yes.

2 Q. And in September of 2008, you reported the scheme to the
3 FBI, correct?

4 A. Yes.

5 Q. And you cooperated with the federal government?

6 A. Yes.

7 Q. Okay. Do you know that PCI shortly thereafter went into
8 bankruptcy?

9 A. Yes.

10 Q. Okay. And are you familiar with who the trustee for the
11 company in bankruptcy was?

12 A. Doug Kelley?

13 Q. Yes.

14 A. Yeah.

15 Q. Okay. And in addition to cooperating with the
16 government, did you cooperate with Mr. Kelley in his
17 functions as trustee of PCI?

18 A. Yes.

19 Q. Okay. Did you meet personally with him?

20 A. With him in his office and other employees.

21 Q. Okay. Meet with other lawyers in the office?

22 A. Yes.

23 Q. And did you cooperate with the tasks that the trustee
24 performed in connection with the bankruptcy of PCI?

25 A. Yes.

1 Q. And we've met before as well, correct?

2 A. Yes.

3 Q. In the past week or so, you and I and Mr. Moheban and
4 Ms. Tancil have had a couple of conversations, correct?

5 A. Yes.

6 Q. About an hour long?

7 A. Yes.

8 Q. One in person, one by Zoom?

9 A. Yes.

10 Q. Okay. Could you tell us at a high level, Ms. Coleman,
11 what your role was in connection with the Ponzi scheme
12 perpetrated by PCI.

13 A. I talked to some of the investors, and then I made up
14 purchase orders.

15 Q. Okay. And the purchase orders were fake?

16 A. Yes.

17 Q. What did they purport to show?

18 A. That Petters Company was buying and selling large
19 amounts of inventory.

20 Q. And were there other people -- and that wasn't true,
21 correct?

22 A. Correct.

23 Q. Ostensibly that was the business of PCI; fair to say?

24 A. Yes.

25 Q. Okay. Were you the only one who was making up fake

1 purchase orders?

2 A. No.

3 Q. Who else?

4 A. Bob White.

5 Q. Okay. And who were the people that ran the Ponzi
6 scheme?

7 A. Myself, Bob White, Tom Petters, Jim Wehmhoff. Greg
8 Bell knew about it --

9 Q. Excuse me. Can I cut you off there?

10 A. He did not run it. Sorry.

11 Q. Can I cut you off there?

12 A. Yes.

13 MR. GLEESON: Move to strike the last part of that
14 answer, just the last name, Your Honor.

15 THE COURT: Any objection?

16 MR. ANTHONY: No objection.

17 THE COURT: Stricken.

18 MR. GLEESON: Thank you.

19 BY MR. GLEESON:

20 Q. And those people you mentioned, not the last one, those
21 people you mentioned, did they work at the PCI offices?

22 A. Yes.

23 Q. Okay. And can you tell us generally what the roles of
24 those people were to the extent -- withdrawn.

25 You mentioned that you and Bob White created fake

1 purchase orders, correct?

2 A. Yes.

3 Q. Okay. Anybody else participate in that besides you and
4 Mr. White?

5 A. Tom Petters did.

6 Q. Okay. And did you -- on that particular function of the
7 scheme, did that last throughout the 14-year period, the
8 creation of fake purchase orders?

9 A. Yes.

10 Q. And were they just fake purchase orders with regard to
11 buying goods, ostensibly buying goods from manufacturers?

12 A. Mainly from Enchanted and Nationwide.

13 Q. Okay. And could you describe to the jury the role of
14 Nationwide and Enchanted in the scheme.

15 A. There were just two companies, individuals that Tom knew
16 that agreed to play along with the scheme.

17 Q. Okay. And that was two -- who were the principals of
18 those two entities; do you recall?

19 A. Larry Reynolds was with Nationwide, and Mike Catain was
20 with Enchanted.

21 Q. And they were in on the scheme?

22 A. Yes.

23 Q. Okay. Were there other fake documents that were
24 prepared in connection with furthering the scheme?

25 A. Yes. There was fake invoices, bank statements, bill of

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1 ladings.

2 Q. Okay. The invoices that were made up purported to
3 reflect what kind of transaction?

4 A. Wholesale and buying and selling merchandise. And we
5 invoiced Enchanted and --

6 Q. Invoices from folks from entities that were purportedly
7 buying the goods?

8 A. Yes.

9 Q. Okay. And you said fake bank statements. Who prepared
10 the fake bank statements?

11 A. Bob White and myself.

12 Q. And the roles of the other people that you mentioned in
13 the scheme, can you briefly describe what they were.

14 A. Tom --

15 Q. For example, you mentioned Jim Wehmhoff. Excuse me for
16 interrupting.

17 A. He talked to some of the investors. He was our
18 accountant.

19 Q. And he talked to some investors and did he talk -- did
20 he tell lies to investors?

21 A. You know, I wasn't -- with the conversation, I wasn't in
22 his office.

23 Q. Fair enough.

24 How old were you when you first met Mr. Petters,
25 Ms. Coleman, approximately?

1 A. 30s.

2 Q. Okay.

3 A. Late 20s, early 30s.

4 Q. How old are you now?

5 A. 56.

6 Q. Okay. And when you first started working for him, do
7 you remember what your salary was or your pay was?

8 A. Rough guess, 30,000, maybe.

9 Q. And over the years, your compensation from
10 Mr. Petters -- were you employed by PCI?

11 A. Yes.

12 Q. And was your compensation provided by PCI?

13 A. Yes.

14 Q. Did you get additional compensation in addition to that
15 that you received from PCI?

16 A. Bonuses.

17 Q. Okay. Were those paid by PCI?

18 A. Yes.

19 Q. Okay. And over the years, those bonuses got larger and
20 larger?

21 A. Yes.

22 Q. And at their -- did they get increasingly higher each
23 year?

24 A. Yes.

25 Q. The scheme came to an end when?

1 A. 2008.

2 Q. And what was your bonus in the year that preceded that,
3 2007?

4 A. Maybe 3 million. I don't remember exactly.

5 Q. Approximately 3 million?

6 A. Yes.

7 Q. Okay. Did you ever make any payments to employees at
8 M&I Bank?

9 A. No.

10 Q. Did you ever give anybody at M&I Bank anything of value
11 in exchange for a favor?

12 A. No.

13 Q. To your knowledge, I'm limiting this to your personal
14 knowledge, did you ever see Tom Petters provide any M&I
15 employee with cash gifts?

16 A. No.

17 Q. Did he provide anything of value, to your knowledge, to
18 M&I employees?

19 A. No.

20 Q. Did you talk to Tom Petters from time to time during the
21 existence of the Ponzi scheme?

22 A. Quite a bit.

23 Q. Were you in the office with him on a daily basis?

24 A. Yes.

25 Q. Did you talk to him and to Bob White about how to

1 advance the scheme?

2 A. It was just a daily routine, but, yeah.

3 Q. Okay. And give the jury a feel, please, Ms. Coleman, as
4 to the nature of the relationships among you and Mr. Petters
5 and Mr. White. For example, did you just take direction
6 from Mr. Petters or did you also participate in the planning
7 of the scheme?

8 A. Both. In the beginning, it was direction from
9 Mr. Petters, and then it just got to be routine, so it was
10 just a -- part of my daily job was just to make up purchase
11 orders and lie to investors.

12 Q. Okay. And over time, you participated in managing the
13 scheme?

14 A. Yes.

15 Q. Okay. Was the same true with regard to Mr. White?

16 A. Well, I wouldn't say I was managing -- all three of us
17 were doing it. Tom was managing it. We were both working
18 for Tom.

19 Q. Who were -- withdrawn.

20 PCI had a bank account at M&I Bank, correct?

21 A. Yes.

22 Q. Did PCI have bank accounts at other banks?

23 A. Yes.

24 Q. Many other banks?

25 A. Yes.

1 Q. Okay. And who were the -- did you have a relationship
2 manager? Was there a particular person at M&I Bank who
3 handled the PCI account there?

4 A. Ed did.

5 Q. And were there -- what was his last name? Do you
6 remember?

7 A. If you said it, I would.

8 Q. Jambor sound familiar?

9 A. Yes.

10 Q. Okay. And did you have additional accounts --
11 withdrawn.

12 Petters Company, Inc. was one of the companies
13 located at Petters' offices -- correct? -- Tom Petters'
14 offices?

15 A. Yes.

16 Q. Okay. There were other companies there as well?

17 A. Yes.

18 Q. What were the names of the other companies, as best you
19 can recall?

20 A. Petters Group, Polaroid, Petters Worldwide. There were
21 a couple other ones too, and I just don't remember offhand.

22 Q. Was Sun Country Airlines there?

23 A. No.

24 Q. He owned Sun Country Airlines?

25 A. Yes.

1 Q. Okay. He owned Polaroid?

2 A. Yes.

3 Q. And going back to the M&I Banking relationship, were
4 there additional accounts at M&I Bank, that is, in addition
5 to the PCI account?

6 A. Yes.

7 Q. Okay. Were there any other relationship managers at M&I
8 Bank besides Ed? Do you understand what I mean by
9 relationship manager?

10 A. Yes, I do. You know, Ed was my main person that I
11 talked to.

12 Q. Okay.

13 A. I don't know about the other companies.

14 Q. The other companies. Did you know if there was another
15 relationship manager after Ed Jambor?

16 A. I don't believe so.

17 Q. Do you recognize the name Chris Flynn?

18 A. I do recognize the name.

19 Q. Okay. Do you recognize him as another banker at M&I
20 Bank who was responsible for the PCI account?

21 A. Yes.

22 Q. It seems like you remember him a little less well than
23 you remember Ed Jambor; is that correct?

24 A. Correct.

25 Q. Did you deal with Chris Flynn infrequently?

1 A. I'm sure I've talked to him. I just don't remember
2 offhand any conversations or anything.

3 Q. How frequently did you deal with Ed Jambor?

4 A. Not a lot. Maybe a couple times a month.

5 Q. Okay. And did you try to limit your contacts with Ed
6 Jambor?

7 A. I guess I -- I guess you could say that, yeah.

8 Q. Well, you tell us. What was the nature of that
9 relationship? Did you look for opportunities to speak to
10 him or speak to him only when it was necessary?

11 A. Only when it was necessary.

12 Q. Were there other bankers at M&I Bank that you recall
13 having contact with?

14 A. The wire department.

15 Q. Okay.

16 A. Oh, any other bankers? No.

17 Q. Wire department is different from the bankers?

18 A. Well, the wire department is the only other --

19 Q. I see. We will get to the wire department in a second.

20 Other than Ed Jambor and -- other than Ed Jambor,
21 was there anybody at M&I Bank who was a banker with whom you
22 had contact that you recall?

23 A. Not that I remember.

24 Q. From time to time would Ed bring people to PCI's offices
25 to talk about banking matters?

1 A. There was a couple times where we met with M&I Bank.

2 Q. Okay. And -- meaning Ed?

3 A. Ed and there was -- I don't remember the names, but
4 there was maybe three of them. There was a lady, and I
5 don't remember who all showed up.

6 Q. People that Ed brought with him?

7 A. Right.

8 Q. Okay. Sometimes did they talk to you about other bank
9 products they would like M&I Bank to avail itself -- excuse
10 me, PCI to avail itself of?

11 A. Not with me directly, no.

12 Q. Okay. You mentioned the wire department. Tell us about
13 your -- the frequency of your interactions with people in
14 the wire department.

15 A. I dealt a lot with the wire department because we had so
16 many wires coming in and so many wires going out, that I
17 would just call the wire department to wire funds and to see
18 when a wire was coming in.

19 Q. Okay. How frequently did that happen? Withdrawn.

20 Did that happen consistently over the years?

21 A. Yes.

22 Q. Okay. And how frequently would you contact people in
23 the wire department?

24 A. Probably an average, I don't know, six times a day.

25 Q. Okay. Well, let's unpack that a little bit. That's a

1 lot of contacts with the wire department, correct?

2 A. Correct.

3 Q. Okay. Could you tell the jury about the process that
4 you used to send wires from the PCI account at M&I Bank.

5 A. We would -- the wires, when we got them in, we would pay
6 off the investors with it.

7 Q. I'm sorry, I didn't --

8 A. I guess I'm not sure. What was your question?

9 Q. Yeah. You sent many wires over the years, correct?

10 A. Correct.

11 Q. Thousands and thousands of wires?

12 A. Correct.

13 Q. Tell us when you wanted to send a wire out of the bank
14 account at PCI [sic] Bank, how you went about doing it.

15 A. I would call the wire department, tell them who I was
16 and then I would give them a code.

17 Q. That was a PIN code or a code that you needed to give --

18 THE COURT: Counsel, keep your questions direct.

19 MR. GLEESON: Sorry, Judge?

20 THE COURT: Your questions need to be direct as
21 opposed to leading.

22 MR. GLEESON: Okay.

23 BY MR. GLEESON:

24 Q. What was the purpose of the code?

25 A. We did a lot wires to different investors, so each

1 investor had their own code so I didn't have to go through
2 the bank and the routing number and the investor's name and
3 their account number all the time. I could just call the
4 wire department, tell them who I was, give them our account
5 number, and then I could just say, Wire \$2 million to P960,
6 and P960 would be like, say, Frank Vennes.

7 Q. And that's the -- and that's the process you engaged in
8 many times a day, correct?

9 A. Correct.

10 Q. Did you speak to the same person in the wire department
11 each time?

12 A. No.

13 Q. Did you get to know them?

14 A. Not really. I mean, I recognized some of the voices.

15 Q. Okay. Did any of them ever ask you about the business
16 of PCI?

17 A. One lady did.

18 Q. What did she say?

19 A. She just asked us what Petters Company did because we --
20 I was calling there all the time, so she just wanted to know
21 what we did.

22 Q. Okay. Do you remember who that was?

23 A. I do not.

24 Q. Do you remember when it was?

25 A. No.

1 Q. Can you roughly approximate where within the 14-year
2 duration of the scheme it was? Beginning? Middle? End?

3 A. Probably more towards the middle/end.

4 Q. Okay. And did she tell you anything else about why she
5 was asking what Petters Company did?

6 A. No.

7 Q. And did you say anything in response to her question?

8 MR. ANTHONY: Objection, lacks foundation,
9 hearsay.

10 THE COURT: Sustained.

11 BY MR. GLEESON:

12 Q. Did you hear back from that person at any point after
13 that conversation?

14 A. No.

15 Q. Did you tell that person at M&I Bank that Petters
16 Company, Inc. was a Ponzi scheme?

17 MR. ANTHONY: Objection, leading, lacks
18 foundation.

19 THE COURT: Sustained.

20 MR. GLEESON: Judge, I am offering it for the
21 state of mind of the bank.

22 THE COURT: Sustained.

23 BY MR. GLEESON:

24 Q. Did you tell her the truth?

25 A. No.

1 Q. Did anybody else at M&I Bank inquire of you about the
2 business of PCI?

3 A. No.

4 Q. Do you recall any of the investors in PCI asking you to
5 create Deposit Account Agreements, to participate in
6 creating Deposit Account Agreements at M&I Bank?

7 A. Yes.

8 MR. ANTHONY: Objection, relevance, 402, 403,
9 foundation, also violates motion in limine order as to
10 investor knowledge.

11 THE COURT: Sustained.

12 BY MR. GLEESON:

13 Q. Did Ed Jambor provide assistance to you from time to
14 time?

15 A. Yes.

16 Q. Okay. And can you tell the jury the types of assistance
17 that he would provide to you.

18 A. There was a couple times where we were overdrawn because
19 a check came through, so I would call Ed up and ask him to
20 hold on to the check because we had a wire coming in.

21 Q. And did he do that for you?

22 A. Yes.

23 Q. And how long did it take the wire to come in?

24 A. We usually had it within the next hour or two.

25 Q. Did any of those situations involve not covering the

1 wire that day?

2 A. No.

3 Q. You were always covered on that day?

4 A. Yes.

5 Q. Did -- was it your understanding you were getting any
6 special treatment from M&I Bank with regard to overdrafts?

7 MR. ANTHONY: Objection, leading.

8 THE COURT: Overruled.

9 THE WITNESS: I guess I didn't look at it that
10 way.

11 BY MR. GLEESON:

12 Q. Okay. You covered the overdrafts when he called?

13 A. Yes.

14 MR. GLEESON: Let's pull up Defendant's Exhibit
15 40026. No, don't, Mr. Herzka.

16 Judge, just to -- I don't want to take the jury's
17 time, but I want to make sure I understand the contours of
18 your sustained objection and I don't run afoul of it.

19 Can I briefly come to sidebar?

20 THE COURT: No, Counsel.

21 MR. GLEESON: Can you pull up 40026, please,
22 Mr. Herzka. This is in evidence.

23 BY MR. GLEESON:

24 Q. Have you seen this document, to your recollection, in
25 the last -- withdrawn.

1 Were you deposed in this case, Ms. Coleman?

2 A. Yes.

3 MR. ANTHONY: Your Honor, objection. I don't
4 think this is admitted into evidence yet, but if he's
5 offering it, we have no objection. But I just want to
6 confirm that it's not in evidence before we start talking
7 about it.

8 MR. GLEESON: I'm sorry. Forgive me.

9 THE COURT: It is not in evidence.

10 MR. GLEESON: Okay.

11 MR. ANTHONY: If he's offering it, we do not have
12 an objection, Your Honor.

13 MR. GLEESON: Thank you, Mr. Anthony. Could you
14 pull it back up -- I offer it.

15 THE COURT: Okay. Let's not show the --

16 MR. GLEESON: Yes. Pull it down, please.

17 THE COURT: -- exhibit until it has been admitted
18 into evidence.

19 MR. GLEESON: Understood.

20 THE COURT: The jury does not see evidence that is
21 not admitted.

22 MR. GLEESON: I understand. I offer it in
23 evidence without objection from my adversary.

24 MR. ANTHONY: No objection, Your Honor.

25 THE COURT: It is received.

1 MR. GLEESON: Thank you, Judge.

2 BY MR. GLEESON:

3 Q. Just take a moment and read that, please, Ms. Coleman.

4 THE COURT: Let's establish for the record what
5 exhibit that is.

6 MR. GLEESON: Yes. This is Defendant's Exhibit
7 40026, Judge.

8 BY MR. GLEESON:

9 Q. Let me know when you are finished, please, Ms. Coleman.

10 (Witness reviews document)

11 A. Okay.

12 Q. Okay. As you sit here today in 2022, do you have any
13 recollection of this?

14 A. Of this exact letter, no.

15 Q. Okay. Do you have a recollection of the events
16 surrounding this letter?

17 A. Yes.

18 Q. Okay. This is a letter to you from Ed Jambor, correct?

19 A. Correct.

20 Q. And does it set forth a couple of options to accommodate
21 a request?

22 A. Yes.

23 Q. Okay. One, and I am referring to the third paragraph,
24 is to set up a custodial checking account, correct?

25 A. Correct.

1 Q. Okay. And that account -- the beneficiary of that
2 account would be one of the -- a company that PCI was doing
3 business with, correct?

4 A. Correct.

5 Q. And it goes on to say, "The Petters account would be
6 required move to M&I trust department in order to meet the
7 monitoring requirements requested by Opportunity Finance."
8 That was the customer, correct?

9 A. Correct.

10 Q. That was your entity you were doing business with?

11 A. Correct.

12 Q. Okay. And then the next paragraph sets forth a second
13 option, which is a "Letter of Credit possibility." I don't
14 see the need to read the rest of the paragraph. Is that
15 correct, that it was a Letter of Credit possibility?

16 A. Yes.

17 Q. Okay. And one would have required moving to the trust
18 department, the other would require a Letter of Credit,
19 correct?

20 A. Correct.

21 Q. Do you recall whether you exercised either of these
22 options?

23 A. We did not.

24 Q. Didn't exercise either one?

25 A. No.

1 Q. Okay. Did -- was there anything about a Letter of
2 Credit and what that would mean that gave you pause?

3 A. I'm sorry. What was that?

4 Q. Was there anything about having a Letter of Credit
5 arrangement with M&I Bank that gave you pause?

6 A. Not with me, no.

7 Q. Okay. The account that you had with M&I Bank was a
8 deposit account -- correct? -- a checking account?

9 A. A checking account, yes.

10 Q. Not a loan account, correct?

11 A. Correct.

12 Q. Did you have to have a Letter of Credit with M&I Bank?

13 A. I don't believe so.

14 Q. Okay. And the deposit account was in essence a checking
15 account; is that right?

16 A. Yes.

17 Q. Did you provide financial statements to M&I Bank in
18 order to open that deposit account?

19 A. I did not.

20 Q. Was there anything about providing financial statements
21 to M&I Bank that gave you pause?

22 A. We didn't -- I mean, we couldn't do financial
23 statements.

24 Q. Why?

25 A. Because it was all a Ponzi scheme.

1 Q. Okay. And did you deliberately avoid arrangements like
2 a Letter of Credit because M&I Bank would find out about the
3 fraud?

4 MR. ANTHONY: Objection, leading.

5 THE COURT: Sustained.

6 BY MR. GLEESON:

7 Q. Do you recall ever being asked to provide letters of
8 credit?

9 A. I was not personally, no.

10 Q. Okay. Did you have a concern -- withdrawn.

11 Did you deliberately only have a deposit account
12 relationship with M&I Bank as opposed to a loan
13 relationship?

14 A. Yes.

15 Q. Why?

16 A. We couldn't get a loan.

17 Q. Why?

18 A. Because it was all a Ponzi scheme. We didn't -- there
19 was really no income.

20 Q. And did you want to avoid having relationships with
21 other departments of the bank?

22 A. I guess I never thought about that.

23 Q. Never thought about asking for -- withdrawn.

24 Did anybody come to PCI's offices and talk in your
25 presence about a loan relationship with PCI?

1 A. Not directly with me, no.

2 Q. Okay. Did you ever talk about that with Bob White or
3 Tom Petters?

4 A. Not that I remember, no.

5 Q. Okay. Let's go back to this other topic related -- this
6 was in 2003, correct?

7 A. Yes.

8 Q. And it didn't happen, correct?

9 A. Correct.

10 Q. In 2008, were any of the businesses that -- any of the
11 investors in PCI seeking deposit account relationships?

12 A. Yes.

13 Q. Okay. And did any of those requests result in the
14 creation of deposit accounts at M&I Bank for those investors
15 as beneficiaries?

16 A. We had a couple of them, yes.

17 Q. Okay. Do you recall with whom?

18 A. Palm Beach was one, and I don't remember the other ones.

19 Q. Just going to be brief on this to abide by the earlier
20 determination.

21 Let me ask you this, Ms. Coleman: In connection
22 with those deposit accounts, was there a mechanism for M&I
23 Bank to be instructed by you to transfer funds into deposit
24 accounts?

25 A. Yes.

1 Q. Did you ever provide such instructions?

2 A. No.

3 Q. Fair to say you knew that what you were doing for the 14
4 years of the scheme was wrong?

5 A. Yes.

6 Q. Okay. Did you have an understanding that if the scheme
7 were discovered, you would be in trouble?

8 A. Well, yes.

9 Q. Tell us, please, your thinking in that regard. Were you
10 concerned about being arrested?

11 MR. ANTHONY: Objection, Your Honor, relevance.

12 THE COURT: Sustained.

13 BY MR. GLEESON:

14 Q. Did there come a point when you expressed any concern to
15 Mr. Petters?

16 MR. ANTHONY: Objection, relevance, hearsay.

17 THE COURT: Sustained.

18 BY MR. GLEESON:

19 Q. Did you try to hide the Ponzi scheme from people who
20 didn't know about it?

21 A. Yes.

22 Q. And were there people at PCI that you hid it from?

23 A. Yes.

24 Q. Who?

25 A. David Baer, Tom Hay. I mean, pretty much all the

1 employees.

2 Q. Sorry?

3 A. I said pretty much all the employees.

4 Q. Okay. All the employees except the ones you mentioned
5 earlier who were participants?

6 A. Correct.

7 Q. Was Tom Petters' image part of the success of the scheme
8 while it was successful?

9 A. Yes.

10 Q. And was that -- did he work on his image in order to
11 make it more successful?

12 A. Yes.

13 Q. Did you personally observe him in the company of
14 celebrities?

15 A. Yes.

16 Q. Which ones? You tell us.

17 A. He hired Ted Mondale. I mean, there was quite a few
18 different ones.

19 Q. Okay. And just remind us who Ted Mondale is.

20 A. The son of the vice president, former vice president.

21 Q. Okay. Did Mr. Petters have other important friends
22 besides the son of former Vice President Walter Mondale?

23 MR. ANTHONY: Objection, lacks foundation as to
24 important.

25 THE COURT: Overruled.

1 THE WITNESS: He did, yes.

2 BY MR. GLEESON:

3 Q. Okay. Do you remember any of them?

4 A. You know, there's so many other -- so many people that
5 he communicated with, I just can't think of any offhand.

6 Q. Was he -- did you personally see him in the company of
7 politicians besides the son of former Vice President
8 Mondale?

9 A. Yes.

10 Q. Which ones that you recall?

11 A. I don't. I know he donated a lot of money and they were
12 always invited to Christmas parties or other events.

13 Q. Okay. So he engaged in philanthropy as well?

14 A. Yes.

15 Q. Was that part of the image that perpetuated -- helped to
16 perpetuate the scheme?

17 A. Yes.

18 Q. Did he -- do you remember any of the particular
19 charities that he contributed to?

20 A. There was quite a few of them. There again, offhand,
21 no.

22 Q. Ever see him in the presence of governors or members of
23 Congress?

24 A. Yes.

25 Q. Do you remember which ones?

1 A. Right off the top of my head, no, I don't remember.

2 Q. Was the acquisition of other companies by Mr. Petters
3 part of his effort to burnish his image?

4 A. Yes.

5 Q. Do you remember any particular acquisitions that were
6 done for that purpose?

7 A. Pretty much all of them; Sun Country, Polaroid,
8 Fingerhut.

9 Q. What was Fingerhut?

10 A. A catalog -- discounted catalog company.

11 Q. Were all of those companies legitimate companies?

12 A. Yes.

13 Q. To your knowledge, was PCI the only illegitimate company
14 among them?

15 A. Yes.

16 Q. You know he owned Petters Warehouse Direct as well?

17 A. Yes.

18 Q. Let's talk about your decision to go to the FBI in
19 September of 2008. Okay?

20 A. Okay.

21 Q. When did you make the decision to turn yourself in,
22 Ms. Coleman?

23 A. In -- I think it was August actually.

24 Q. Okay. And why did you report yourself to the FBI?

25 A. I just wanted it over with.

1 Q. You wanted the scheme over with?

2 A. Right. No longer wanted to be part of it.

3 Q. Okay. Did you -- were you concerned about the
4 consequences that would -- you would face by disclosing your
5 crimes?

6 MR. ANTHONY: Objection, leading.

7 THE COURT: Overruled.

8 THE WITNESS: No, I just wanted it over with. I
9 guess I didn't care what happened to me.

10 BY MR. GLEESON:

11 Q. You wanted to put it behind you?

12 A. I did.

13 Q. Did -- where did you -- how did you do it? Where did
14 you go? Who did you see when you turned yourself in to the
15 FBI?

16 A. I went to the FBI. And, you know, there was a table
17 full of people. It was FBI, IRS.

18 Q. Okay.

19 A. Attorneys.

20 Q. And you went in. Were you accompanied by counsel?

21 A. Yes.

22 Q. Okay. And let me ask you a few questions about 2008
23 before you turned yourself in.

24 Was the economy in trouble in 2008?

25 THE COURT: Counsel, counsel, this is direct

1 examination; nonleading questions.

2 BY MR. GLEESON:

3 Q. Could you describe for the jury what the economic
4 circumstances were in 2008, as best you can.

5 (No response.)

6 Q. Let me try it this way: Was it more difficult to raise
7 investments in 2008 than it had been previously?

8 A. It was, yes.

9 Q. Did that have anything to do with your decision to go to
10 the FBI?

11 A. No.

12 Q. You just wanted the whole thing behind you?

13 A. I did.

14 Q. Okay. What was the first thing that happened when you
15 went in and said you wanted -- excuse me.

16 Tell us the first thing that happened when you
17 went to the FBI.

18 MR. ANTHONY: Objection, relevance.

19 THE COURT: Overruled.

20 THE WITNESS: I brought them a stack of papers and
21 told them what was going on and who was involved in the
22 Ponzi scheme. And they -- I went back to the office that
23 evening because Tom had a meeting, and they put a wire on me
24 and I started recording conversations.

25 BY MR. GLEESON:

1 Q. Okay. And did you have -- did you have to be truthful
2 to the FBI? Was it your understanding you had to be
3 truthful?

4 A. Yes.

5 Q. Did -- what else was your understanding with regard to
6 the debriefings? What were your obligations?

7 A. You know, I honestly couldn't tell you. I just know I
8 wanted it over with, and I was just ready to cooperate and
9 answer the questions they had and just do whatever they
10 said.

11 Q. Did you have an understanding as to what would happen if
12 you told them lies?

13 MR. ANTHONY: Objection, leading.

14 THE COURT: Sustained.

15 BY MR. GLEESON:

16 Q. You had an understanding you had to tell the truth,
17 correct?

18 A. Yes.

19 Q. And were you honest?

20 A. Yes.

21 Q. Did they ask you who was involved in the scheme?

22 MR. ANTHONY: Objection, hearsay.

23 THE COURT: Sustained.

24 MR. ANTHONY: And leading.

25 BY MR. GLEESON:

1 Q. Did you leave out any details in your description of the
2 events to the FBI?

3 A. No.

4 Q. Did you tell the FBI that anyone at M&I Bank was
5 involved in the scheme?

6 MR. ANTHONY: Objection, leading, no foundation,
7 nonverbal hearsay, Rule 802.

8 THE COURT: Sustained.

9 Counsel, keep your questions direct.

10 MR. GLEESON: I'm sorry?

11 THE COURT: Keep your questions direct.

12 MR. GLEESON: Thank you, Your Honor.

13 BY MR. GLEESON:

14 Q. Ms. Coleman, did anyone at M&I ever tell you they had
15 figured out that PCI was running a Ponzi scheme?

16 MR. ANTHONY: Objection, leading, lacks
17 foundation.

18 THE COURT: Sustained.

19 BY MR. GLEESON:

20 Q. I just want to ask you about the things that you
21 personally observed. All right?

22 A. Okay.

23 Q. Okay. Did you ever observe anyone at M&I Bank indicate
24 that -- did you ever observe anyone at M&I Bank say that
25 they knew there was a Ponzi scheme at PCI before Tom Petters

1 was arrested?

2 MR. ANTHONY: Objection.

3 MR. GLEESON: Can I approach, Your Honor?

4 THE COURT: Yes, you may.

5 **(At sidebar)**

6 MR. GLEESON: The motion that was made last night
7 that the Court rejected registered, as Mr. Anthony's
8 comments this morning did, an agreement that to the extent
9 that what she saw and heard is offered in evidence, that's
10 fine. Not are you aware of whether they knew, but if -- the
11 question here is whether M&I Bank knew or had reason to
12 suspect there was a Ponzi scheme, and the fact that they
13 never told, all she's doing is an observation. Obviously it
14 would be admissible to prove their state of mind if they
15 said they knew. Obviously it would be admissible to prove
16 their state of mind if they said they suspected. It's just
17 as equally probative of their state of mind if they didn't
18 say they knew and if they didn't say they suspected.

19 These are observations and lack of observations
20 that are directly probative. This is the insider in the
21 scheme, and this is all about the intent of M&I Bank and the
22 knowledge of M&I Bank. And this is how to prove an absence
23 of intent, is the person at PCI with whom they dealt on a
24 regular basis never saw or heard any indication that they
25 knew.

1 This is precisely what the trustee's counsel said
2 in its motion last night was permissible.

3 MR. ANTHONY: Okay. So she's already disqualified
4 herself with respect to any wire room people because she
5 can't remember who she talked to, what they said, so that
6 group of people are out. The only other people she says she
7 can recall talking to are Jambor, Flynn and Rhode.

8 So, first of all, the suggestion that did anyone
9 from the bank call you is overly broad and lacks in
10 foundation. And if he's going to ask about conversations
11 with Mr. Jambor or Ms. Rhode or Mr. Flynn, I'd just like to
12 know what the conversation is, when it occurred, and if he's
13 going to ask in that conversation, Did they tell you they
14 knew about the Ponzi scheme, I'd just like to be able to
15 know when it occurred, as opposed to some broad statement,
16 Over 6 years or 14 years, did anybody ever ask you.

17 There's no way I can test her recollection.
18 There's no way I can test the veracity or the foundation.
19 It's overly broad, and it also --

20 THE COURT: So your objection is overbroad?

21 MR. ANTHONY: I have multiple objections. I have
22 no foundation, it seeks to establish the bank's knowledge,
23 getting into the mind of the bank as to what the bank
24 thought based on what this witness's observations were.

25 What her observations are are irrelevant. The

1 question is what -- all the bank employees have said they
2 don't know. Whether she thinks they knew or not isn't
3 relevant, and that's what he's asking, basically. He wants
4 to create the negative impression that she thought the bank
5 didn't know.

6 MR. GLEESON: I'm not ask --

7 MR. ANTHONY: And I don't think that's --

8 MR. GLEESON: Excuse me.

9 MR. ANTHONY: And I don't think that's

10 [inaudible] --

11 MR. GLEESON: I'm not asking --

12 COURT REPORTER: I'm sorry. I don't think that's?

13 MR. ANTHONY: I don't think that's admissible.

14 MR. GLEESON: Judge, I am not asking her what she
15 thinks. I'm asking her whether she's spoken about
16 participants in this scheme. I'm asking her whether anybody
17 at M&I Bank told her, and I can break it down by individual.
18 I'm not asking about a particular discussion. I'm asking
19 whether Ed Jambor ever told her that he knew about the
20 scheme or said anything to that effect or whether he said
21 anything to the effect that he was suspicious. That's
22 directly probative.

23 The fact that he didn't do that and this was his
24 contact with somebody at the heart of the scheme is directly
25 probative of his knowledge, which, as Mr. Anthony just

1 mentioned, is the key in the case. It is the key of the
2 case, the knowledge of the people at M&I Bank.

3 MR. ANTHONY: I think that his question is leading
4 and suggests an answer.

5 I think if he asked the question, Did you ever
6 have any conversation with Mr. Jambor in which you discussed
7 the Ponzi scheme, she can answer that question. But to
8 suggest that the bank -- I think he can ask her, Did you
9 have a conversation with Mr. Jambor in which you discussed
10 the Ponzi scheme. I think he can ask that question. But to
11 ask it in the way he's proposing to ask it is -- Did anyone
12 from the bank tell you it was aware of the Ponzi scheme, is
13 objectionable for all the reasons we indicated.

14 MR. GLEESON: Judge, with all respect to
15 Mr. Anthony, I would like to conduct my own examination.
16 And at the heart of the case is the absence -- for our case
17 is the absence of knowledge on the part of the M&I bankers.
18 And this is probative evidence of the absence of knowledge,
19 that they did not talk to Deanna about any suspicion or any
20 knowledge.

21 I should not be required, nor is it what I am
22 trying to prove, that in all of their various discussions,
23 she never mentioned it. She's already said she never
24 mentioned it. It's important to demonstrate the absence of
25 knowledge as evidenced by their never telling her they were

1 even suspicious.

2 MR. ANTHONY: The fact they didn't tell her they
3 weren't suspicious does not prove that the bank didn't have
4 something in its mind that created suspicion. That's the
5 impression it's giving. This witness's views of whether the
6 bank knew or not are irrelevant.

7 MR. GLEESON: I'm not asking her views. And what
8 Mr. Anthony is arguing goes to the weight of this evidence,
9 Judge, not its probative value.

10 THE COURT: I agree. The objection is overruled.

11 **(In open court)**

12 BY MR. GLEESON:

13 Q. Did Ed Jambor ever say to you that he had figured out
14 that PCI was running a Ponzi scheme?

15 A. No.

16 Q. Did he ever say to you that he had a suspicion that PCI
17 was running a Ponzi scheme?

18 MR. ANTHONY: Objection, leading.

19 THE COURT: Sustained.

20 BY MR. GLEESON:

21 Q. Did -- on the subject of -- I want to limit your
22 answers -- I am limiting my question to things that you
23 observed, not what you thought. Do you understand that
24 difference, Ms. Coleman?

25 A. I do.

1 Q. Okay. On the subject of what you observed, did you --
2 what did you observe in connection with Ed Jambor's
3 suspicion, if anything, that there was a Ponzi scheme going
4 on at PCI?

5 MR. ANTHONY: Objection, lacks foundation.

6 THE COURT: Overruled. You may answer.

7 THE WITNESS: Nothing.

8 BY MR. GLEESON:

9 Q. Okay. The same question with regard to Chris Flynn.
10 What did you observe?

11 A. Nothing.

12 Q. Okay. Same question with regard to anyone you dealt
13 with with whom you had conversations or communications at
14 M&I Bank. Same question.

15 A. Nothing.

16 Q. Did you have -- you had meetings -- did you have
17 meetings at PCI with Ed Jambor?

18 A. Yes.

19 Q. Okay. Roughly how many? Do you recall?

20 A. Just a couple.

21 Q. Did the subject of retailer payments ever come up?

22 A. I'm sure it did. I just don't remember the exact
23 conversation.

24 Q. Okay. Did the subject of whether retailer payments were
25 to be made directly into PCI's account come up?

1 A. Not that I recall.

2 Q. Okay. Was it important to you that M&I -- withdrawn.

3 Was it important to you that PCI appeared to the
4 world as a legitimate business?

5 A. Yes.

6 Q. Was that important to everybody in the scheme?

7 A. Yes.

8 Q. Did you ever talk to Ed Jambor or Chris Flynn about
9 Nationwide and Enchanted's role in the scheme?

10 A. Not that I remember, no.

11 Q. Did you feel as though you received special treatment in
12 any regard in any way from M&I Bank?

13 MR. ANTHONY: Objection, leading, lacks
14 foundation.

15 THE COURT: Overruled.

16 THE WITNESS: No.

17 BY MR. GLEESON:

18 Q. Did you get special treatment from other banks?

19 A. Yes.

20 Q. Okay. What special treatment did you get from other
21 banks?

22 MR. ANTHONY: Objection, lacks foundation.

23 THE COURT: Overruled.

24 THE WITNESS: Crown Bank would wire funds when we
25 didn't have funds in their account or give Tom a cashier's

1 check.

2 Then Associated Bank, there was a time where I
3 needed someone from Associated Bank to talk to one of the
4 investors because we needed to buy another day for our bank
5 statement, and he did.

6 BY MR. GLEESON:

7 Q. Did you ask that person to lie?

8 A. Yes.

9 Q. And did that happen?

10 MR. ANTHONY: Objection, lacks foundation,
11 leading.

12 THE COURT: Overruled.

13 THE WITNESS: Yes.

14 BY MR. GLEESON:

15 Q. Let's go back to Crown Bank. Who was the person that
16 provided the favors at Crown Bank?

17 MR. ANTHONY: Objection, relevance.

18 THE COURT: Sustained.

19 BY MR. GLEESON:

20 Q. Okay. I'm going to show you what's in evidence as
21 Defendant's Exhibit --

22 MR. GLEESON: I'm almost finished, Your Honor.
23 I'll finish before the lunch break.

24 BY MR. GLEESON:

25 Q. -- Defendant's Exhibit 10014, which is in evidence.

1 MR. GLEESON: Mr. Herzka, if you could pull it up
2 on the screen. Hard to read. Maybe it can be enlarged a
3 bit.

4 BY MR. GLEESON:

5 Q. It's a Depository Agreement. Do you see that?

6 A. I do.

7 Q. Okay. There was a Depository Agreement between PCI and
8 M&I Bank, correct?

9 A. I'm assuming there was. I don't remember.

10 MR. GLEESON: Okay. Let's scroll to the
11 signature. We can pull that out. We don't need that.

12 BY MR. GLEESON:

13 Q. Do you recall a Depository Agreement between M&I Bank
14 and PCI, that there was one, Ms. Coleman?

15 A. You know, I'm sorry, I don't remember.

16 Q. Kind of a lot of fine print there, correct?

17 A. Well, this was after I was done.

18 Q. Yeah. My questions are actually different. I have it
19 up there.

20 A. Okay.

21 Q. But my questions relate to conduct in which you engaged
22 or did not engage. So let me ask you just a couple of
23 questions.

24 Did you receive account statements from M&I Bank?

25 A. Bank statements? Yes.

1 Q. Yes.

2 Every month?

3 A. Yes.

4 Q. Excuse me. Withdrawn.

5 How frequently did you receive them?

6 A. Monthly.

7 Q. Okay. Did you review them?

8 A. No.

9 Q. Okay. Did -- do you know if they -- do you have any
10 information about what they contained?

11 A. Just like any other bank statement.

12 Q. Someone else reviewed them at PCI, if they were reviewed
13 at all?

14 A. I would turn them over to Sandy Indahl.

15 Q. Okay.

16 A. Or Jim Wehmhoff.

17 Q. Who is Sandy Indahl?

18 A. She was an employee at Petters Company in accounting.

19 Q. Okay. We don't need to pull it up. It's in evidence.

20 The document says that PCI agrees to notify M&I
21 Bank within 30 days of the date the bank mailed or made
22 statements or items available to depositor.

23 Did you ever complain about bank statements to M&I
24 Bank, you personally?

25 A. No.

1 Q. Make any complaints about their content?

2 A. No.

3 Q. Okay. You ever in any way indicate to M&I Bank that the
4 account statements were inaccurate?

5 A. No.

6 Q. You received -- as you testified earlier, you were
7 frequently involved with wire transfers, correct?

8 A. Yes.

9 Q. Okay. Let me show you for identification -- there's a
10 book before you. Do you see that little book?

11 A. Yes.

12 Q. In it is a document that's got a tab before it that
13 says, "DX-50386." Let me know when you get to it.

14 A. Okay.

15 Q. Okay. You got it?

16 A. Yes.

17 Q. What is it? What does it say at the top?

18 A. "Wire Transfer Agreement."

19 Q. And do you recognize it?

20 A. Not really. It is my writing.

21 Q. Is that your signature at the bottom?

22 A. Yes.

23 Q. And it's dated 1-17-06, correct?

24 A. Correct.

25 Q. And it's a Wire Transfer Agreement between M&I, Marshall

1 & Ilsley Bank and customer. Do you see that?

2 A. Yes.

3 Q. Okay.

4 MR. GLEESON: I offer it in evidence.

5 MR. ANTHONY: No objection, Your Honor.

6 THE COURT: It is received in evidence.

7 MR. GLEESON: Thank you. Could you pull it up,

8 Mr. Herzka.

9 BY MR. GLEESON:

10 Q. Let's go to page 2, paragraph 8, and to the last line of
11 the paragraph.

12 Again, completely unreadable, but it says in
13 there, right at the end, "All claims arising" -- are you
14 with me, Ms. Coleman?

15 A. Yes.

16 Q. There you go. "All claims arising by reason of any
17 transfer must be submitted to Bank in writing within one
18 year after the Customer received notification from the Bank
19 identifying the order." Do you see that?

20 A. I do.

21 Q. Did you ever complain to M&I Bank that the funds being
22 wired out of the account were inaccurate?

23 A. No.

24 Q. Okay. Did you have the authorization to transfer wires?

25 A. Yes.

1 Q. Okay. And was -- do you have any reason to believe M&I
2 was transferring wires except at your direction?

3 A. No.

4 MR. GLEESON: Can I just have one moment, Judge,
5 to confer with my colleagues? I think I'm finished.

6 THE COURT: You may.

7 (Defendant's counsel confer)

8 MR. GLEESON: I have no further questions,
9 Your Honor. Thank you.

10 Thank you, Ms. Coleman.

11 MR. ANTHONY: It will just be a minute,
12 Your Honor, while we change over.

13 THE COURT: Okay. We will be taking our lunch
14 break at noon.

15 MR. ANTHONY: Thank you, Your Honor.

16 (Pause)

17 THE COURT: Counsel, you may proceed.

18 MR. ANTHONY: Thank you, Your Honor.

19 **CROSS-EXAMINATION**

20 BY MR. ANTHONY:

21 Q. Good morning.

22 A. Good morning.

23 Q. You were an officer of PCI, correct?

24 A. Correct.

25 Q. I think on the documents we just saw, you were listed as

1 the vice president of operations, correct?

2 A. Yes.

3 Q. And Mr. Petters was the CEO or president?

4 A. Yes.

5 Q. And Mr. White, what was his title again?

6 A. I think it was chief financial officer, but I'm not
7 sure.

8 Q. And you had mentioned in response to counsel's questions
9 a number of employees of PCI. Dave Baer, Tom Hay. Do you
10 remember that?

11 A. Yes.

12 Q. They weren't employees of PCI, were they?

13 A. Correct, they were not.

14 Q. Okay. So I just want to focus for this question on who
15 were the employees of PCI?

16 A. Debbie Lindstrom; Bob White; myself; and I'm not sure if
17 Sandy Indahl was an employee at Petters Company, Inc. or if
18 it was Petters Group.

19 Q. And Mr. Petters was an employee as well?

20 A. Yes.

21 Q. So White, Petters, you, were clearly employees, right?

22 A. Correct.

23 Q. And Ms. Lindstrom and maybe Ms. Indahl might have also
24 been employees?

25 A. Correct.

1 Q. And I think the other people who you mentioned, they
2 were employed by Petters Group Worldwide; is that correct?

3 A. Yes.

4 Q. Okay. And I think your testimony was that you and
5 Mr. Petters and Mr. White were trying to conceal from all
6 the other employees, including the ones at PCI, the Ponzi
7 scheme that was going on, correct?

8 MR. GLEESON: Object to leading.

9 THE COURT: Overruled.

10 THE WITNESS: Yes.

11 BY MR. ANTHONY:

12 Q. You mentioned the companies Nationwide and Enchanted.
13 Tell us first who controlled Nationwide.

14 A. Larry Reynolds.

15 Q. And who controlled Enchanted?

16 A. Mike Catain.

17 Q. And did they basically, the two of them, do the same
18 thing with their companies vis-a-vis this Ponzi scheme?

19 A. I don't know what else they did with their companies. I
20 just know Petters Company was the Ponzi scheme with them.

21 Q. So what did Nationwide -- what was Nationwide's
22 participation in the Ponzi scheme?

23 A. Petters Company, Inc. would wire them funds -- well, I
24 take that back. The investor would wire Nationwide money,
25 according to the purchase order that I gave them, and then

1 Nationwide would turn around the same day and sometimes the
2 next day wire that money back to PCI.

3 Q. And when Nationwide wired the money back to PCI, was the
4 money wired back to PCI's 9018 account in M&I Bank?

5 A. That -- I don't remember the account number, but it kind
6 of sounds right.

7 Q. Whether you remember the account number or not, you
8 remember Nationwide wiring the money back to PCI at M&I
9 Bank, correct?

10 A. Correct.

11 Q. And Enchanted would do the same thing, correct?

12 A. Correct.

13 Q. And you said you provided purchase orders and those were
14 fake purchase orders?

15 A. Yes.

16 Q. And with respect to the entities to whom PCI was going
17 to sell these electronic goods, did you create false
18 invoices showing that big-box retailers were going to buy
19 those goods?

20 A. Yes.

21 Q. Now, I understand your testimony, you could send wires,
22 correct?

23 A. Yes.

24 Q. And tell me if my understanding is correct. You
25 didn't -- you could call up on the phone and tell the bank

1 what you wanted it to do, correct?

2 A. Yes.

3 Q. You didn't have to fill out any paperwork for that
4 particular wire instruction, you could just call them up on
5 the phone and give them like a PIN number and it would work?

6 A. Yes.

7 Q. And as I understand it, when you weren't around to do
8 the wires, you would instruct Ms. Lindstrom on how to do the
9 wires?

10 A. Yes.

11 Q. It was pretty much just the two of you that went through
12 that wiring process, correct?

13 A. Yes.

14 MR. GLEESON: Your Honor, I will wait for your
15 signal as to when you are ready for us to stop.

16 THE COURT: Okay. Is this a break in the
17 questioning?

18 MR. GLEESON: Yes, there is a break.

19 THE COURT: Okay. Members of the Jury, we will
20 take our lunch break. Please plan to be back in the
21 courtroom at 1:00.

22 Please remember the instructions that I have given
23 you and do not discuss this case or anything about this
24 case. Don't do any kind of research or anything else. And
25 I hope you have a good -- and don't let anyone discuss the

1 case around you or with you. Have a good lunch.

2 (Jury excused)

3 **IN OPEN COURT**

4 **(JURY NOT PRESENT)**

5 THE COURT: And we are in recess. We will resume
6 at 1:00.

7 MR. ANTHONY: Thank you, Your Honor.

8 THE COURT: You're welcome.

9 (Lunch recess taken at 12:00 p.m.)

10 * * * * *

11 (1:01 p.m.)

12 **IN OPEN COURT**

13 **(JURY PRESENT)**

14 THE COURT: Good afternoon. Please be seated.

15 MR. ANTHONY: Thank you, Your Honor.

16 THE COURT: Good afternoon.

17 BY MR. ANTHONY:

18 Q. Good afternoon, Ms. Coleman.

19 A. Good afternoon.

20 THE COURT: You may proceed, Counsel.

21 MR. ANTHONY: Thank you.

22 BY MR. ANTHONY:

23 Q. Before the break, Ms. Coleman, you were asked by counsel
24 for the bank if PCI had gotten any special treatment from
25 M&I Bank. Do you recall those questions?

1 A. Yes.

2 Q. And I want to ask you about that.

3 MR. ANTHONY: Ms. Ellig, please bring up P-37.

4 It's a letter to Polaroid. It's in evidence.

5 BY MR. ANTHONY:

6 Q. Showing you a document that's been marked as P-37, do
7 you recall asking Mr. Jambor to send this letter to Polaroid
8 on behalf of PCI?

9 A. I don't. I'm not sure if I did or not.

10 Q. Okay. Let's look at -- bring up -- look in your book at
11 Exhibit 120, please. It's not in evidence.

12 A. Okay.

13 Q. Do you see the first page of Exhibit 120? Do you
14 recognize that as a fax cover sheet to you from Mr. Jambor?

15 A. Yes.

16 Q. Okay. And the second page is the exhibit we just saw?

17 A. Yes.

18 Q. Do you recall asking Mr. Jambor to send that letter on
19 your behalf?

20 A. I don't. It doesn't mean I didn't. I just don't
21 remember. It also is possible that Tom maybe asked him and
22 that he just sent it to me because Tom told him to.

23 Q. Do you recognize yourself as the recipient of
24 Exhibit 120 on that fax cover sheet?

25 A. Yes.

1 MR. ANTHONY: We'll offer Exhibit 120, Your Honor.

2 MR. GLEESON: No objection.

3 THE COURT: Exhibit 120 is received.

4 BY MR. ANTHONY:

5 Q. And the letter, which is this second page, is to Michael
6 Pocock at Polaroid, right?

7 A. Correct.

8 Q. Do you recall having your deposition being taken on
9 October 31st, 2017, and saying in that deposition that you
10 asked Mr. Jambor to send that letter?

11 A. That is very well possible. I just don't remember it
12 today, but that is possible --

13 Q. Okay. Why don't you --

14 A. -- if I said it back then.

15 MR. ANTHONY: Is her deposition exhibit up there
16 or do you have it here?

17 MR. GLEESON: Which one is it, Mr. Anthony?

18 MR. ANTHONY: It's from October 31st, 2017.

19 MR. RICHIE: May I approach the witness, Your
20 Honor?

21 THE COURT: You may.

22 MR. ANTHONY: I've got this one here. That's
23 okay.

24 BY MR. ANTHONY:

25 Q. Take a look at page 68, please. And this deposition was

1 given by you under oath on October 31st, 2017, correct?

2 A. Correct.

3 Q. And turn to page 68, line 3.

4 MR. ANTHONY: And if you will put up Exhibit 120,
5 please.

6 BY MR. ANTHONY:

7 Q. And you were asked this question:

8 "I'm showing you, Ms. Coleman, Exhibit 120, which is a
9 fax from M&I Bank to you dated December 13, 2004."

10 And your answer to that question was: "Yes."

11 Correct?

12 A. Yes.

13 Q. And then you were asked the question:

14 "And the second page is a letter directed to the board
15 of directors at Polaroid Holding Company, attention
16 J. Michael Pocock, president and chief executive officer,
17 and it's signed by Mr. Jambor. Now, Mr. Jambor is basically
18 sending this letter to you; is that right?"

19 And your answer was: "Yes."

20 Correct?

21 A. Yes.

22 Q. And the next question you were asked was:

23 "Did you or Mr. Petters ask Mr. Jambor to prepare and
24 send this letter to Polaroid?"

25 And you answered that question: "Yes."

1 A. Yes.

2 Q. And then the next question was:

3 "Who drafted the letter?"

4 And the answer that you gave was: "Ed did or I -- I
5 might have told him what to put in it, but he drafted it."

6 And then the next question was: "And so he drafted it
7 at your direction, correct?"

8 And your answer was: "Yes."

9 Correct?

10 A. Yes.

11 Q. And then the last question -- two questions:

12 "And you advised him what the subject of the letter
13 should be?"

14 And you answered that question "Yes."

15 A. Yes.

16 Q. Then the next question was:

17 "And do you agree it was, in fact, sent to Polaroid?"

18 And the answer was --

19 MR. GLEESON: Objection --

20 Q. -- "I'm almost positive it was."

21 MR. GLEESON: Excuse me, Mr. Anthony. I didn't
22 know you were finished. I object to the improper use of the
23 deposition transcript.

24 THE COURT: Overruled.

25 I didn't -- you were asking a final question, and

1 I didn't hear --

2 MR. ANTHONY: Yes.

3 THE COURT: -- whether you completed it.

4 BY MR. ANTHONY:

5 Q. And the last question was:

6 "Do you agree that it was, in fact, sent to Polaroid?"

7 And your answer was: "I'm almost positive it was."

8 THE COURT: Now, is that a question?

9 MR. ANTHONY: No. I just read her question -- the
10 question and the answer, Your Honor.

11 THE COURT: No. Well, you can't do that.

12 MR. ANTHONY: Okay.

13 THE COURT: You can ask --

14 MR. ANTHONY: You're correct, Your Honor.

15 THE COURT: You're impeaching by a prior
16 inconsistent statement, and you're doing it improperly on
17 that last question.

18 BY MR. ANTHONY:

19 Q. Were you asked this question:

20 "And do you agree that it was, in fact, sent to
21 Polaroid?"

22 And did you answer, "I'm almost positive it was"?

23 A. Yes.

24 Q. Okay. Now, did you have that letter that you drafted to
25 be sent to Polaroid in mind when you answered counsel's

1 earlier question that you didn't get any special treatment
2 from the bank?

3 A. No, I didn't.

4 Q. Okay. And I know you didn't remember it, and I'm not --
5 I'm not saying anything about that. I just wanted to bring
6 it to your attention.

7 The other thing is -- now, there's been some
8 discussion here about DACAs. You know what a DACA is,
9 right, Deposit Account Control Agreement?

10 A. Yes.

11 Q. And you had conversations at various times with the bank
12 about providing DACAs to lenders or investors, correct?

13 A. Yes.

14 Q. And do you remember a time in 2008 when there was a
15 discussion about you providing a list of transactions to the
16 bank in connection with a DACA?

17 A. Yes.

18 Q. And you never did that, did you?

19 A. No.

20 Q. And the bank never asked you for it, did they -- did it?

21 A. Correct.

22 Q. And did you consider that to be special treatment when
23 you were asked the question of did you receive any special
24 treatment from this bank in response to counsel's questions?

25 MR. GLEESON: Objection. Ask to approach.

1 THE COURT: Overruled. You may answer the
2 question.

3 THE WITNESS: Okay.

4 BY MR. ANTHONY:

5 Q. Did you have that in mind when you answered counsel's
6 questions earlier?

7 A. No.

8 Q. Okay. Then I want to invite your attention to
9 Exhibit 55, which is already in evidence. If you have it in
10 the book -- it might be there, but we're going to put it up
11 on the screen for you too.

12 This is an e-mail from you to Ed Jambor asking him
13 to fax a letter back to you.

14 MR. ANTHONY: And would you turn to page 2,
15 please, and enlarge that, please.

16 BY MR. ANTHONY:

17 Q. Now, did you ask Mr. Jambor to send this letter back to
18 Tom Petters in connection with the conversations that were
19 being had with respect to Opportunity Finance?

20 A. Yes.

21 Q. Okay. And did you send a letter like this to Mr. Jambor
22 and ask him to put it on bank letterhead and send it back?

23 A. I don't remember exactly how it happened.

24 Q. Do you remember generally how it happened?

25 A. I would assume that I would have asked him to do that

1 because otherwise how would he have known.

2 Q. And so --

3 (Plaintiff's counsel confer)

4 BY MR. ANTHONY:

5 Q. Let's look at Exhibit 56, please.

6 MR. ANTHONY: And could you put 56 next to 55 on
7 the screen, please.

8 BY MR. ANTHONY:

9 Q. Exhibit 56 -- so if you look at Exhibit 55, you'll see
10 that at the top there's a letter missing in the first
11 sentence, "Pursuant to our recent discussions we are
12 please." Do you see that?

13 A. Yes.

14 Q. And then if you look at Exhibit 56, it looks like the
15 same misspelling appears on 56, the one that's on the bank
16 letterhead. Do you see that?

17 A. Yes.

18 Q. Do you think that -- when you were asked questions about
19 special treatment in response to counsel's questions, did
20 you have anything like Exhibits 55 or 56 in mind when you
21 answered those questions?

22 A. No.

23 Q. Now, I know you've testified here in response to
24 counsel's questions that you thought you didn't get special
25 treatment from the bank, but you have testified that you

1 thought M&I would bend over backwards to help PCI out in
2 whatever way they can. Didn't you say that one time?

3 MR. GLEESON: Objection, leading. Also ask to
4 approach the bench, please.

5 THE COURT: Overruled as to leading. You may
6 approach.

7 **(At sidebar)**

8 MR. GLEESON: Judge, the first time I'm alluding
9 to this morning the Court allowed me to treat this as an
10 adverse witness, which I understood gave me some leeway
11 about leading, and then it turned out I was instructed not
12 to lead.

13 This -- I think it's hard to refute the notion
14 that Mr. Anthony should not be permitted to lead, but --
15 that's the Court's determination, but I'm a little perplexed
16 given the ruling this morning.

17 THE COURT: I understand your concern.

18 MR. GLEESON: And, second, the very argument we
19 had earlier -- this "bend over backwards" is a view in her
20 mind about what happened. It reflects what she thinks about
21 what the bank would do, which is precisely what we ruled out
22 of bounds.

23 There's no -- there's not only no foundation for
24 it, but even if there were, her notion that the bank would
25 bend over backwards is not a substitute for discrete

1 historical facts about the relationship with the bank.

2 And there's a number of these questions in the
3 deposition, and that was a deposition. No one was there to
4 rule on evidentiary objections. But questions like this I
5 predict, given what happened in the deposition and given
6 that, are -- so this is the heart of my objection. It's not
7 permissible -- it's not admissible evidence. It's her state
8 of mind about what the bank would do for her, and that's
9 just not admissible. That falls in the category was the
10 bank aware that there was a fraud. That was ruled out of
11 bounds for me, and this is in principle no different.

12 MR. ANTHONY: Your Honor, he opened the door by
13 asking her if she thought she got -- PCI got any special
14 treatment from the bank. She's now -- she's going to
15 testify that -- that was her state of mind, no special
16 treatment from the bank.

17 I'm entitled to ask her, especially since she has
18 said, "It seemed like M&I Bank would bend over backwards to
19 help us out in whatever way they can" -- that directly
20 contradicts the testimony that she got no special treatment
21 or thought she was getting no special treatment.

22 He opened the door by asking if she got special
23 treatment. I'm entitled to get her view as to whether or
24 not the bank would bend over backwards and, in fact, did
25 bend over backwards to help her.

1 And for them to elicit testimony that she didn't
2 get any special treatment but you got special treatment from
3 somewhere else, without any foundation, without any support,
4 undercuts my ability to present our case.

5 He started it, this closes it, and it's a fair
6 comment.

7 MR. GLEESON: Judge, I think that's wrong because
8 Mr. Anthony has just demonstrated how by eliciting facts,
9 Polaroid letter, the two other instances, that he believes
10 that -- the trustee advances the view that they did get
11 special treatment by reference to specific facts.

12 This "bend over backwards" is an empty vessel. We
13 don't even know what it means. He's entitled, of course, to
14 elicit facts to rebut our -- she talked about overdrafts and
15 how the overdrafts were covered. He's entitled to elicit
16 facts that will help rebut her factual claim that she did
17 not receive special treatment. That's fine. These are not
18 facts.

19 THE COURT: Why aren't they facts?

20 MR. GLEESON: I'm sorry?

21 THE COURT: Why aren't they facts?

22 MR. GLEESON: Her belief that the bank would bend
23 over backwards, that's her state of mind. Her state of mind
24 is not at issue in the case. I didn't put it in issue. I
25 elicited whether factually there were -- she received

1 special treatment. He's shown how he can try to demonstrate
2 otherwise. But her state of mind about whether it's bend
3 over backwards or would do anything I asked, that's not
4 evidence, Judge.

5 MR. ANTHONY: He asked whether she received
6 special treatment. It wasn't -- he didn't elicit facts. He
7 asked her state of mind. He said, Did you receive special
8 treatment from the bank? She said, No.

9 This is the same witness who's saying this bank
10 would bend over backwards for us. And I think I'm entitled
11 to ask her about her view, just as he asked her about her
12 state of mind. And that's all this is.

13 It's totally unfair to let him go down that road
14 and ask her about special treatment she got, but then when
15 we ask her if it's her view, having now demonstrated that
16 she forgot all the things that was happening to her -- I
17 think we're entitled to ask this.

18 THE COURT: Well, it seems that the proper
19 impeachment would be to show what she got as opposed to her
20 view. So you can ask did you get this, did you get that.
21 That is rebutting the statement.

22 MR. GLEESON: Judge, in light of your -- you said
23 you understood what I was saying about leading. I don't
24 want to keep objecting to leading if he's permitted to do
25 it, but I think he's not.

1 THE COURT: Is she an adverse witness?

2 MR. GLEESON: Not for him. She is to me.

3 MR. ANTHONY: Yes, she is. She's adverse to the
4 trustee. He sued her. The trustee has sued her and
5 recovered all her money.

6 MR. GLEESON: Judge, she testified that she fully
7 cooperated with the trustee, testified for him, sat with his
8 lawyers. She cooperated with him just like she cooperated
9 with the government. She is not adverse --

10 MR. ANTHONY: The --

11 MR. GLEESON: Let me finish, please.

12 MR. ANTHONY: I know. I am.

13 MR. GLEESON: She's a former officer of the entity
14 in which -- the shoes of which Mr. Kelley stands, so she is
15 basically our adversary. And she's cooperated with the
16 trustee and his counsel. He should not be permitted to --
17 respectfully, Judge, he shouldn't be permitted to lead.
18 This is not an adverse witness for the trustee.

19 MR. ANTHONY: Your Honor?

20 MR. GLEESON: They haven't demonstrated --

21 MR. ANTHONY: I'm sorry. Counsel has met
22 [inaudible] --

23 THE COURT: I didn't hear you. Counsel has?

24 MR. ANTHONY: Counsel has met with -- defense
25 counsel has met with her on at least two occasions to

1 discuss her testimony.

2 Secondly, if I have to elicit testimony that she's
3 adverse to Mr. Kelley because he had to sue her to recover,
4 it will show she's adverse to Mr. Kelley. She's not --
5 Mr. Kelley is not standing in her shoes. I think I'm
6 entitled to both ask her this question and to elicit
7 testimony that shows that she's been less than accurate in
8 her testimony thus far.

9 THE COURT: The objection is overruled.

10 MR. ANTHONY: Okay.

11 MR. GLEESON: Your Honor, that's on the leading.

12 MR. ANTHONY: I didn't hear the last comment, Your
13 Honor. He came back and I didn't hear what you said. I'm
14 sorry.

15 THE COURT: I said, "The objection is overruled."

16 MR. GLEESON: The leading objection? You earlier
17 said leading. With respect to special treatment, he could
18 elicit only discrete facts and not bend over backwards.
19 That objection was sustained, I understood it.

20 MR. ANTHONY: No. It's overruled is what I
21 understood.

22 THE COURT: Where -- what's the origin of the
23 "bend over backwards"?

24 MR. ANTHONY: Her testimony in this proceeding in
25 the case and it's in her deposition.

1 THE COURT: And you are?

2 MR. ANTHONY: I was just going to ask her if she
3 said that.

4 THE COURT: And that's objectionable because?

5 MR. GLEESON: As I stated a few minutes ago,
6 that's objectionable, and I thought the Court agreed. He's
7 allowed to elicit discrete facts about special treatment
8 that the trustee claims was accorded to PCI by M&I Bank, but
9 this "bend over backwards" is not special treatment. It's
10 precisely the kind of mind -- you know, it's the state of
11 mind of someone whose state of mind is not an issue.

12 And it's no different than if I had asked her was
13 she -- is she aware whether M&I Bank new of the scheme.
14 That was placed out of bounds. This is another way of
15 asking the same question. Your Honor ruled on this a few
16 minutes ago.

17 THE COURT: Yes, I did. It's out of bounds.

18 MR. ANTHONY: Okay.

19 **(In open court)**

20 BY MR. ANTHONY:

21 Q. Ms. Coleman, any other areas, now that we've been
22 talking for a few minutes, where you think the bank provided
23 special treatment to PCI?

24 MR. GLEESON: Objection to the form of the
25 question. The testimony was she didn't have it in mind.

1 She didn't say it was special treatment.

2 THE COURT: Overruled. You may answer the
3 question.

4 THE WITNESS: Not offhand.

5 BY MR. ANTHONY:

6 Q. Okay. Now, you mentioned that, in your testimony, that
7 I think Mr. Jambor and -- neither Mr. Jambor or Mr. Flynn
8 never asked you about Enchanted or Nationwide, correct?

9 A. Yes.

10 Q. And you knew, from your review of the bank records, that
11 there were billions of dollars going through the M&I Bank
12 account from Nationwide and Enchanted, correct?

13 A. Yes.

14 Q. And in the couple times a month you met with Mr. Jambor,
15 did he ever raise with you what the purpose was for those
16 payments from Nationwide and Enchanted?

17 A. Not that I can remember.

18 Q. Now, did you consider him to be giving you any kind of
19 special treatment by not raising that with you?

20 A. I guess not, no.

21 Q. Okay. So, in fact, didn't you have a conversation with
22 Mr. Jambor and Ms. Rhode in which you told them that there
23 were retailer payments being made into -- or supposed to be
24 made to the PCI account?

25 A. Yes.

1 Q. And let's talk about the conversation with Ms. Rhode and
2 Ms. [Sic] Jambor in which you told them that.

3 MR. ANTHONY: Please put up DX-40026. Ms. Ellig,
4 can you put up DX-40026, please.

5 (Plaintiff's counsel confer)

6 MR. ANTHONY: It was admitted this morning, 40026.

7 BY MR. ANTHONY:

8 Q. Do you remember this letter this morning, Ms. Coleman,
9 that this is a letter from Ed Jambor to you saying that
10 Shari, referring to Ms. Rhode, and he had met with you to
11 talk about the relationship? Do you see that?

12 A. I do.

13 Q. Okay. And in that meeting do you recall discussing with
14 Ms. Rhode and Mr. Jambor retailer payments?

15 A. To some extent, yes.

16 Q. All right. So tell the jury what you recall telling
17 Ms. Rhode and Mr. Jambor about retailer payments from
18 big-box retailers into the M&I account.

19 A. I don't remember the exact words or how it came about,
20 but Opportunity Finance wanted an account set up for the
21 retailer payments to go directly into that account.

22 And I know I told M&I Bank or Shari and Ed that we
23 couldn't do that because we could not have the retailers
24 send the money directly to M&I Bank. They had to send it
25 to -- I can't remember the exact story, but basically how we

1 couldn't have the retailer sending it directly to M&I Bank
2 because it wouldn't look good on our part if we had, say,
3 National -- or not National, I'm sorry, say Costco sending
4 payments to all different banks because they wanted it set
5 up where -- I don't know if I'm making any sense, but they
6 wanted it set up where, like, Opportunity Finance invested
7 in this purchase order and they wanted that purchase order,
8 when it got paid, to go directly to M&I Bank. And another
9 investor, who may have a bank out in New York, they would
10 want that money to go directly to that bank out in New York.

11 So we couldn't have the vendors sending wire
12 transfers all over the world, that they would only send it
13 to M&I Bank, if that makes sense.

14 Q. Okay. So you've been talking about the big-box retailer
15 payments that were supposed to come into the M&I account.
16 Did Mr. Jambor ask you any further questions about it?

17 A. No.

18 Q. How about Ms. Rhode, did she ask any questions about
19 these big-box retailers and the money that was supposed to
20 come into the account; did she ask any questions?

21 A. No.

22 Q. In fact, there was no money coming from big-box
23 retailers, was there?

24 A. No.

25 Q. And if one were to look at the bank statements and

1 records for the M&I PCI account, one wouldn't see any
2 payments from big-box retailers, would they?

3 A. Correct.

4 Q. So -- now, this was in 2003. So between 2003 and 2007,
5 before Mr. Jambor left the bank, did he ever come back to
6 you and ask you where are the big-box retailer payments that
7 are supposed to go into the M&I account?

8 A. No.

9 Q. How about Ms. Rhode, did she ever come back and ask you?

10 A. No.

11 Q. Now, one of their bosses was a woman by the name of
12 Ms. Crain, who testified here yesterday. Did Ms. Crain ever
13 come back and ask you about these big-box retailer payments?

14 A. No.

15 Q. How about any of the AML analysts, did they ever ask you
16 about big-box retailer payments?

17 A. No.

18 Q. Did I ask you about Mr. Flynn? Maybe not. Did he ever
19 ask you?

20 A. No.

21 Q. If M&I's business bankers dug into the absence of any
22 big-box retailer payments, would you have been able to
23 continue with the scheme?

24 A. No.

25 Q. And I think you said that you and Mr. Petters and

1 Mr. White, you had access to the Petters bank account
2 records at M&I, correct?

3 A. Yes.

4 Q. And you could see what was going on in that account by
5 looking at whatever records you wanted to look at, right?

6 A. Yes.

7 Q. And PCI and you and Mr. Petters and Mr. White, you had
8 access to all those bank records, right?

9 A. Yes.

10 Q. And obviously M&I Bank had access to all of PCI's bank
11 records, right?

12 A. Yes.

13 Q. Did anyone else have access to all of M&I's bank
14 records, other than the bank itself and you and Mr. Petters
15 and Mr. White?

16 A. Jim Wehmhoff did.

17 Q. He was with PCI?

18 A. Yep. Or with Petters Group.

19 And Sandy Indahl, I believe. I just don't
20 remember what exactly I gave her, but I think Sandy Indahl
21 might have had access to it too.

22 Q. Is that it?

23 A. Yes.

24 Q. Now, PCI did not want the lenders to know -- PCI did not
25 want the lenders to bank at M&I Bank; is that correct?

1 A. Correct.

2 Q. And that was a concern, that if the lenders banked at
3 M&I Bank, they might discover -- I withdraw that.

4 Did you think PCI had a good relationship with M&I
5 Bank?

6 A. Yes.

7 Q. And did you think it was the kind of bank that PCI could
8 work with?

9 A. Yes.

10 Q. And PCI had been looking for a bank that it could work
11 with for ten years or so, hadn't it?

12 A. Yes.

13 Q. And it finally found one in M&I?

14 A. Yes.

15 Q. Now, was most of the money for this Ponzi scheme running
16 in and out of the M&I bank account?

17 A. Yes.

18 Q. You mentioned PCI had a few other bank accounts, but
19 this M&I bank account was the primary bank account for
20 running the Ponzi scheme?

21 A. Yes.

22 MR. ANTHONY: Nothing further, Your Honor.

23 MR. GLEESON: May I, Your Honor?

24 THE COURT: Yes, you may.

25 **REDIRECT EXAMINATION**

1 BY MR. GLEESON:

2 Q. You were asked, toward the end of your examination by
3 Mr. Anthony, about having found a bank that you could work
4 with, meaning M&I Bank, correct?

5 A. Yes.

6 Q. Was the Ponzi scheme that PCI was running in operation
7 before the M&I bank account was opened by PCI?

8 A. Yes.

9 Q. There were other banks with which the PCI scheme worked,
10 correct?

11 A. Yes.

12 Q. Okay. And when you say "work with," was M&I part of the
13 scheme?

14 A. No.

15 Q. Okay. Did you work with M&I Bank in the same way you
16 worked with Crown and Associated Bank?

17 (Pause)

18 Q. Do you understand the question?

19 A. Yeah.

20 Q. Did Crown Bank assist in the perpetration of the scheme?

21 A. No.

22 Q. Did Associated Bank assist in the perpetration of the
23 scheme?

24 A. No.

25 Q. Did either lie to investors?

1 MR. ANTHONY: I'm sorry. I didn't hear that
2 question.

3 BY MR. GLEESON:

4 Q. Did either of the two -- you testified on direct
5 examination about special treatment from Associated and
6 Crown Bank. Do you recall that?

7 A. Yes.

8 Q. Were there bankers at either of the two that assisted in
9 the scheme by lying to investors?

10 MR. ANTHONY: Objection, foundation, relevance,
11 motion in limine with respect to investor knowledge.

12 MR. GLEESON: This was elicited on direct, Your
13 Honor.

14 THE COURT: Overruled.

15 THE WITNESS: No.

16 BY MR. GLEESON:

17 Q. Okay. Do you recall your testimony earlier this
18 morning?

19 A. Well, I did.

20 Q. Sorry?

21 A. Yes.

22 Q. Okay. And do you recall testifying that one of the
23 bankers lied to investors for you -- lied to an investor for
24 you?

25 A. Right, about a bank statement that -- yes, but it wasn't

1 part of the Ponzi scheme. He lied to an investor, making an
2 excuse on why we did not -- he could not give out the bank
3 statements.

4 Q. Understood. He was not among the people you identified
5 as participating in the scheme, correct?

6 A. Correct.

7 Q. Did you ask that banker to help you in a way that would
8 help advance the scheme, by lying to investors?

9 MR. ANTHONY: Objection, beyond the scope, lacks
10 foundation, relevance.

11 THE COURT: Overruled.

12 THE WITNESS: I asked the banker to lie about not
13 being able to get a bank statement.

14 BY MR. GLEESON:

15 Q. In order that a fake bank statement -- you would have
16 time to make fake bank statements up, correct?

17 A. Correct.

18 Q. Did you tell that banker that was the reason for the
19 lie?

20 MR. ANTHONY: Same objection, hearsay.

21 THE COURT: Overruled.

22 THE WITNESS: I don't recall exactly what I told
23 the banker. It was a long time ago.

24 BY MR. GLEESON:

25 Q. Okay. Did Ed Jambor ever tell you that he looked and

1 determined that the money in the account was not coming from
2 retailers?

3 MR. ANTHONY: Objection, leading.

4 THE COURT: Sustained.

5 BY MR. GLEESON:

6 Q. On the subject of retailer payments into the PCI
7 account, on that topic, did Ed Jambor make any statements to
8 you regarding that topic, his knowledge about that topic?

9 A. Not that I remember.

10 Q. Okay. Could you -- there's that big, thick document --
11 or notebook.

12 MR. ANTHONY: Your Honor, before we go down this
13 path, these were undisclosed document. I have no idea what
14 they are.

15 MR. GLEESON: No, these are the transcripts.

16 BY MR. GLEESON:

17 Q. If I could direct your attention to tab 10, your
18 deposition transcript in this case that Mr. Anthony invited
19 your attention to earlier you there. Are you there?

20 A. Yep.

21 Q. If you could turn, please, to page 168 and if you could
22 read to yourself, Ms. Coleman, the -- on page 168, lines 3
23 through 6. And please let me know when you finish.

24 (Witness reviews document)

25 Q. You done?

1 A. Yes.

2 Q. Does that refresh your recollection about whether
3 Mr. Jambor ever spoke to you about retailer payments being
4 wired into the account?

5 A. Yes.

6 Q. And what is your recollection?

7 A. No.

8 Q. He did not?

9 A. He did not.

10 Q. Okay. Did you ever have a conversation with him about
11 whether he even looked at who was wiring money into the
12 account?

13 MR. ANTHONY: Objection, leading, argumentative.

14 THE COURT: Overruled.

15 THE WITNESS: Not that I remember.

16 BY MR. GLEESON:

17 Q. On the same page, but -- it's page 167 of the
18 transcript. It's on the same page of the book. If you
19 could read to yourself, please, lines 10 through 13, and let
20 me know when you're finished.

21 (Witness reviews document)

22 A. Okay.

23 Q. Okay. Does that refresh your recollection about a
24 conversation with Ed Jambor about whether he looked
25 specifically at who was wiring funds into the account?

1 A. Yes.

2 Q. And what is your recollection?

3 A. That he didn't.

4 Q. Okay. If you were asked about big-box retailers -- if
5 you were asked questions about big-box retailers wiring
6 payments into the M&I account, would you have told the
7 truth?

8 A. No.

9 Q. You would have lied?

10 A. Yes.

11 Q. To keep the scheme going?

12 A. Yes.

13 Q. Did anybody within PCI itself raise any questions about
14 the origins and destinations of the wires into and out of
15 the account?

16 A. No.

17 Q. Okay. You know Sandy Indahl?

18 A. Yes.

19 Q. Okay. Did she ever raise a question about the wires?

20 A. I don't remember her ever raising a question to me.

21 Q. Okay. Have you ever talked to Bob White about that
22 topic generally?

23 A. Did I?

24 Q. Yes.

25 A. Not that I remember.

1 Q. Okay. You were asked whether you had in mind the letter
2 that was written to the board of directors of Polaroid when
3 you testified that you didn't receive special treatment from
4 M&I Bank. Do you recall that questioning on your
5 cross-examination?

6 A. Yes.

7 Q. Okay. Did you think that letter was special treatment?

8 A. No. I just thought it would be a letter that Ed would
9 write.

10 Q. Okay. Did you consider it customer service?

11 A. Yes.

12 Q. Okay. Was the content of the letter, as far as you
13 know, truthful?

14 A. I don't remember exactly what the letter said, but --

15 Q. Okay. On any occasion -- withdrawn.

16 Did you ever ask Ed Jambor to provide untruthful
17 information?

18 A. No.

19 Q. Okay. To your knowledge, did he ever do so?

20 MR. ANTHONY: Objection, lacks foundation.

21 THE COURT: Sustained.

22 BY MR. GLEESON:

23 Q. The -- you testified that you did not have in mind, when
24 you said you didn't receive special treatment from M&I Bank,
25 the Deposit Account Agreements. Do you recall that?

1 A. Yes.

2 Q. You were asked about the transaction lists, correct?

3 A. Correct.

4 Q. Okay. And no one -- you testified no one at M&I Bank
5 called you about the transaction list, correct?

6 A. Correct.

7 Q. Okay. For whose benefit were those transaction lists?

8 A. I'm not -- I'm sorry. What was the question?

9 Q. Yeah, it's a bad question.

10 You never sent them, correct?

11 A. Correct.

12 Q. Under the agreement that created the Deposit Account
13 Agreement, who was -- who would have been benefited had you
14 sent transaction lists?

15 A. Nobody.

16 Q. Okay. The deposit account was to be held by whom?

17 A. Petters Company and the investor.

18 Q. Okay. One of them was Palm Beach, correct?

19 A. Correct.

20 Q. Would anybody have benefited had you sent the
21 transaction list to M&I Bank?

22 A. No, because I would have made it up.

23 Q. Would it have gone into an account by Palm Beach -- held
24 by Palm Beach?

25 A. Possibly, depending on if it was their funds or not.

1 Q. Okay. Why didn't you provide the transaction lists?

2 A. It was never -- they never asked for it, M&I Bank
3 didn't.

4 Q. Okay. Did Palm Beach -- was Palm Beach aware you
5 weren't -- withdrawn.

6 Palm Beach was the counterparty, correct, to that
7 Deposit Account Agreement?

8 A. I'm not sure how it -- I'm sorry. I don't remember how
9 it all worked out.

10 Q. Okay. If you provided transaction lists, you would have
11 provided -- they would have been provided to Palm Beach,
12 correct?

13 A. There again, I'm not sure.

14 Q. Okay. Did you regard the entry into the Deposit
15 Agreement as special treatment from M&I Bank to PCI?

16 A. No, I guess not.

17 MR. GLEESON: And let's pull up 55 and 56, please,
18 Mr. Herzka, P-55 -- Plaintiff's 55 and 56 in evidence.

19 BY MR. GLEESON:

20 Q. You were examined about these two letters. I might have
21 the exhibit numbers wrong. They were letters that were
22 put --

23 MR. GLEESON: There we go. Thank you, Mr. Herzka.

24 BY MR. GLEESON:

25 Q. You were asked by Mr. Anthony about the missing letter

in the first sentence, correct?

A. Yes.

Q. "Pleased" has a missing "d," correct?

A. Correct.

MR. GLEESON: Could you pull up the exhibit number so we can see the exhibit numbers, because I think I want to refer to 56. Okay. I've got it.

BY MR. GLEESON:

Q. There's a missing sentence in one of these letters, correct?

A. I guess I'm not sure.

Q. I'll help you out. On the bottom of 56 it says, "We understand" --

MR. GLEESON: If you can enlarge that for all of us, please, Mr. Herzka.

BY MR. GLEESON:

Q. "We understand that you are interested in opening this account as soon as possible. We will work with you upon satisfactory completion of the Opportunity Finance/West LB facility." Do you see that?

A. Yes.

Q. That's missing from the bottom of 55, correct?

A. Yes.

Q. Okay. What's missing is the "satisfactory completion of Opportunity Finance/West LB facility," right?

1 A. Yes.

2 Q. That was added to the letter by M&I Bank, correct?

3 A. Yes.

4 MR. GLEESON: And let's pull up Defendant's 40026.

5 BY MR. GLEESON:

6 Q. This is the -- you testified about this on direct and
7 cross. This is the Account Agreement -- this refers to an
8 Account Agreement, Deposit Account Agreement, that was never
9 created, correct?

10 A. Correct.

11 MR. GLEESON: I have nothing further. Thank you,
12 Your Honor.

13 **RECROSS EXAMINATION**

14 BY MR. ANTHONY:

15 Q. Not too many more questions, Ms. Coleman.

16 A. Okay.

17 Q. You were asked about other banks that did business with
18 PCI. Would it be fair to say that the Ponzi scheme
19 substantially grew in size after PCI began working with M&I
20 in 2001?

21 A. Yes.

22 Q. And you talked about another bank that was willing to
23 write a letter to one of PCI's customers. Do you remember
24 that testimony at the outset just recently and that it was
25 an inaccurate letter? Do you remember counsel's questions

1 on that?

2 A. Another letter to an investor?

3 Q. A letter. Remember you said that a bank gave you
4 special help or treatment in writing a letter for you, other
5 than M&I?

6 A. Where they talked about the bank statement?

7 Q. Yes.

8 A. That wasn't a letter, but a phone call.

9 Q. A phone call, okay.

10 A. Yes.

11 Q. So let me -- I just want to understand your view. So
12 the Polaroid letter, the Opportunity Finance letter where
13 you asked M&I Bank to draft a letter -- that you had asked
14 it to draft and send on its letterhead --

15 A. Yes.

16 Q. -- because you didn't want to send it yourself, did you
17 think that was misleading?

18 MR. GLEESON: Objection to form.

19 THE COURT: Overruled.

20 THE WITNESS: Yes.

21 BY MR. ANTHONY:

22 Q. Okay. So you were willing to -- I mean, M&I was willing
23 to do things which you considered misleading. And do you
24 think they considered it misleading?

25 MR. GLEESON: Objection.

1 THE COURT: Sustained.

2 BY MR. ANTHONY:

3 Q. Okay. When you asked the bank to send these letters as
4 though it came from them instead of from you, did anyone
5 from the bank, like Mr. Jambor, say we can't do that, that
6 would be misleading?

7 MR. GLEESON: Objection, there's no foundation for
8 the premise of that question.

9 THE COURT: Sustained.

10 BY MR. ANTHONY:

11 Q. You asked Mr. Jambor to send a letter to Polaroid on
12 your behalf, correct?

13 A. Yes.

14 Q. And you asked him to send a letter to Opportunity
15 Finance on your behalf, correct?

16 A. Yes.

17 Q. In connection with either of those two letters, did
18 Mr. Jambor tell you, in substance or effect, that he
19 couldn't do that because it was misleading?

20 A. No.

21 Q. Now, when you had the meeting with Ms. Rhode and
22 Ms. [Sic] Jambor back in 2003 and talked about big-box
23 retailer payments, did Mr. Jambor say anything to you which
24 would have indicated to you that he didn't understand what
25 you were saying?

1 MR. GLEESON: Objection to the form of the
2 question.

3 THE COURT: Overruled.

4 THE WITNESS: No.

5 BY MR. ANTHONY:

6 Q. How about Ms. Rhode, did she say anything about what you
7 were telling her about the big-box retailer payments and the
8 business model, did she say to you she didn't understand
9 what you were saying?

10 A. No.

11 Q. You were asked this question by counsel. The question
12 was: If you had been asked by Mr. Jambor after this 2003
13 meeting about big-box retailer payments, would you have
14 lied? Do you recall that question?

15 A. I do.

16 Q. And you said you would have lied, correct?

17 A. Correct.

18 Q. And would you agree that M&I Bank had all the records in
19 its possession to see whether big-box retailer payments were
20 going into the M&I account?

21 A. Yes.

22 Q. So if they had asked that question and if you had lied,
23 would you agree that they could have looked at the records
24 in the account and determined you were lying?

25 MR. GLEESON: Objection.

1 THE COURT: Overruled.

2 THE WITNESS: Yes.

3 BY MR. ANTHONY:

4 Q. And they never asked you that question, did they?

5 A. No, they didn't.

6 MR. ANTHONY: Nothing further.

7 MR. GLEESON: We have nothing further. The
8 witness may be excused as far as we're concerned. Thank
9 you, Judge.

10 THE COURT: May the witness be excused?

11 MR. ANTHONY: Yes.

12 THE COURT: You may.

13 MS. GITTES: May I, Your Honor?

14 THE COURT: You may.

15 MS. GITTES: BMO Harris's next witness is Paul
16 Stroble. Just give us a minute, if you don't mind, to get
17 reorganized.

18 (Pause in proceedings)

19 COURT REPORTER: Stop there and I will swear you
20 in.

21 (Witness sworn)

22 MS. GITTES: Your Honor, would you mind if we
23 approach the witness and just clear out some of those
24 binders?

25 THE COURT: Not at all. Please do.

1 MS. GITTES: And I believe my colleague has just
2 one packet of materials for the Court and your clerk.

3 THE COURT: Thank you.

4 Members of the Jury, if you would like to take a
5 stretch break during this transition, please feel free to do
6 so.

7 (Pause)

8 MS. GITTES: Whenever the Court is ready.

9 THE COURT: Thank you.

10 MS. GITTES: May I proceed?

11 THE COURT: You may. And please raise your voice
12 so we can hear you.

13 MS. GITTES: Oh, absolutely.

14 THE COURT: You don't have to raise the podium,
15 just your voice.

16 MS. GITTES: I'll raise the podium a little bit
17 too.

18 Did Mr. Stroble state his name for the record yet?

19 COURT REPORTER: No.

20 Could you please state your full name and spell
21 your first and last name, please.

22 THE WITNESS: Paul Brian Stroble, P-a-u-l,
23 B-r-i-a-n, S-t-r-o-b-l-e.

24 THE COURT: Counsel, you may proceed.

25 MS. GITTES: Thank you, Your Honor.

~~Stroble - Direct~~

(Paul Stroble)

DIRECT EXAMINATION

BY MS. GITTES:

Q. Good afternoon, Mr. Stroble.

A. Good afternoon.

Q. Where do you currently work?

A. I work for BMO Harris.

Q. And how long have you worked for BMO Harris?

A. Since March of 2010.

Q. And was it called BMO Harris in March of 2010, to your recollection?

A. No, it was not. When I started with the bank, it was M&I Bank.

Q. And what's your current job title?

A. Senior messaging technical specialist.

Q. And at a very high level, because we'll get into the specifics, what does a senior messaging technical specialist do?

A. We engineer the messaging or, like, the e-mail systems for the bank.

Q. And has this generally been your job throughout your time at first M&I and then BMO Harris?

A. Yes.

Q. Okay. And if I -- I'll try to be precise, but if I refer to the bank, does that work for you?

Stroble - Direct

1 A. Yep.

2 Q. Okay. So before we get into more about your work, I'd
3 like to just take a step back.

4 Where do you currently live?

5 A. Greendale, Wisconsin.

6 Q. And where is that?

7 A. It's a southern suburb of Milwaukee.

8 Q. Are you married?

9 A. I am.

10 Q. And what's your spouse's name?

11 A. Amy.

12 Q. And do you and Amy have children?

13 A. We do. We've got two boys.

14 Q. And what are their names?

15 A. Jack and Matt.

16 Q. And in terms of your background, did you go to college?

17 A. I did.

18 Q. And where did you go?

19 A. I started with a two-year associate's degree at
20 Milwaukee Area Technical College.

21 Q. And did you later -- is that the only degree that you
22 received?

23 A. No. After my first son was born, I went back and got my
24 bachelor's degree from Lakeland College in Sheboygan,
25 Wisconsin.

1 Q. So if you got your associate's degree in 1998, what have
2 you been doing since that time?

3 A. Been working in IT since then, including when I went
4 back and got my bachelor's.

5 Q. And in the IT field, has there been a particular kind of
6 job that you've focused on in the last, I guess, 20,
7 24 years?

8 A. Yeah. I've been primarily a messaging system, mostly
9 Lotus Notes, administrator for the majority of my career.

10 Q. And where do you currently work, like out of what office
11 or workspace?

12 A. I actually currently work out of a home office.

13 Q. That's nice.

14 And is it correct, then, that your work and
15 schooling have been pretty computer related?

16 A. Yes.

17 Q. And why is that?

18 A. I have always enjoyed computers. Took out a loan when I
19 was just out of high school to buy my own first computer. I
20 just was kind of an early adopter of that technology and
21 enjoyed it.

22 Q. So going back to when you started at M&I Bank -- which I
23 think you said was in March of 2010; is that right?

24 A. Correct.

25 Q. What was your title when you started?

Stroble - Direct

1 A. Senior Lotus Notes administrator.

2 Q. And, just quickly, what's Lotus Notes?

3 A. Lotus Notes is a software platform that allows for
4 collaboration and e-mail.

5 Q. And what were your responsibilities as a Lotus Notes
6 administrator?

7 A. Primarily for the maintenance and administration and
8 troubleshooting if there were any issues of Lotus Notes and
9 the other messaging platforms within the bank.

10 Q. And if I can direct you to sort of the 2014 to 2018 time
11 period.

12 A. Okay.

13 Q. Did you have colleagues who you worked with in your role
14 supporting the bank's Lotus Notes function?

15 A. Yes.

16 Q. How many colleagues do you recall you had in that
17 general time period?

18 A. At that point supporting Lotus Notes, there would have
19 been two others other than me.

20 Q. And do you recall the names of those other co-workers?

21 A. Yes, Dave Schmitz -- I'm sorry, Dave Scherer and Brian
22 Schmitz.

23 Q. Okay. So you worked with Dave and Brian generally in
24 the period of 2014 to 2018?

25 A. At least that time, yeah. They had been with the bank

1 since about 2010 as well.

2 Q. I see.

3 A. Yeah.

4 Q. So you worked with them, in fact, before 2018 --

5 A. Yes.

6 Q. -- excuse me, 2014?

7 A. Yes.

8 Q. And just focusing on Mr. Scherer, Dave Scherer, did he
9 have a similar role to yours?

10 A. He did, yes.

11 Q. And does he still work at the bank?

12 A. He does not.

13 Q. Do you know why he no longer works at the bank?

14 A. He was laid off.

15 Q. And when was he laid off?

16 A. Roughly, 2020.

17 Q. 2020.

18 And do you know someone named John Vanderheyden?

19 A. I do.

20 Q. And who is Mr. Mr. Vanderheyden?

21 A. He was the vice president of technology or IT for M&I
22 Bank.

23 Q. And on the sort of corporate structure, where was
24 Mr. Vanderheyden in relation to you?

25 A. He was my boss's boss.

Stroble - Direct

1 Q. Boss's boss.

2 So in your work, first at M&I, then at BMO Harris,
3 have you become familiar with something called backup tapes?

4 A. Yes.

5 Q. And at a high level, what are backup tapes?

6 A. Backup tapes are a physical media used to back up the
7 digital contents of servers.

8 Q. And based on your experience and your time, again, at
9 M&I and now at BMO Harris, what's the purpose of a backup
10 tape?

11 A. Backup tapes were used for -- to back up the contents
12 should we ever need to restore a server in the event of a
13 disaster scenario or for disaster recovery.

14 Q. When you say "disaster recovery," what do you mean by
15 that?

16 A. Server crashes, a server is -- you know, needs to be
17 rebuilt, fire, flood, that type of scenario, and we need to
18 bring the server back into an operational state.

19 Q. So if there was some kind of disaster that damaged a
20 server, just at a high level, how could backup tapes be
21 used?

22 A. You can restore the content of those tapes onto new
23 servers to get that data back and then functional again.

24 Q. And, Mr. Stroble, I'd like to show you a document that's
25 already in evidence. You have a hardcopy on your table

there.

MS. GITTES: And I'm going to ask Mr. Herzka to put it up on the screen, please. This is, for the record, Plaintiff's Exhibit 796.

BY MS. GITTES:

Q. Do you see that there?

A. Mm-hmm.

Q. And just for the record, this is, I think, a 25-, 26-page document?

A. Yeah.

Q. Do you recognize this document?

A. I do.

Q. And what is it?

A. It's a picture of a backup tape.

Q. And do you recall this particular backup tape for -- and if you can -- if you need to flip through the document, that's fine.

A. No. I mean, I do recall that these were the pictures that were taken, not by me, of the backup tapes that I found in 2017.

Q. So you found -- just to make sure it's clear, you found backup tapes when?

A. In December of 2017.

Q. And does this set of pictures, which we'll look at in a few minutes, depict those tapes?

Stroble - Direct

1 A. It does.

2 Q. You mentioned something a minute ago. Do you -- you
3 said you didn't take these pictures?

4 A. I did not take these pictures. These pictures appear to
5 have been taken by the third-party company, eMag Solutions,
6 that the bank used to restore the content from these tapes.

7 Q. So a vendor called eMag took the pictures --

8 A. Mm-hmm.

9 Q. -- to your knowledge?

10 A. To my knowledge, yes. And I say that because when I
11 found the pictures, it didn't have this barcode label on it
12 that says, "eMag Solutions."

13 Q. Thank you. That's helpful, Mr. Stroble.

14 MS. GITTES: Actually, Mr. Herzka, could you just
15 blow up that -- the barcode on the left there. I think
16 that's what Mr. Stroble was referring to.

17 THE WITNESS: Yep, that's it.

18 BY MS. GITTES:

19 Q. So just to be clear, what is that barcode with the white
20 label and the letters?

21 A. It's a barcode that I can only assume was added by eMag
22 Solutions for them to keep track of each tape.

23 MS. GITTES: You can zoom back out, Mr. Herzka.
24 Thank you.

25 BY MS. GITTES:

1 Q. So other than those barcodes, does this reflect, I
2 guess, this particular tape as you found it?

3 A. Yes.

4 Q. And we're going to talk about this in a minute, but did
5 you review this document before you came here to testify
6 today?

7 A. Yep.

8 Q. And to the best of your recollection, is this an
9 accurate depiction of all the tapes you found in December of
10 2017?

11 A. Yes.

12 MR. COLLYARD: Objection, Your Honor, relevance.
13 And this might require a little bit of an explanation based
14 on your order.

15 THE COURT: And when you're referring to "this,"
16 you meant Exhibit 796?

17 MS. GITTES: Thank you, Your Honor. I should have
18 been clear. 796.

19 THE COURT: So you're asking for a sidebar?

20 MR. COLLYARD: If you'll have one, yes, Your
21 Honor.

22 THE COURT: I will.

23 **(At sidebar)**

24 MR. COLLYARD: So, Your Honor, this entire line of
25 testimony is going to be about what they found in 2017. It

1 has nothing to do with the issues in this case, which backup
2 tapes were destroyed in 2010, 2011, and 2014. That was the
3 entire basis of the Bankruptcy Court's order. That was the
4 entire basis of your affirmance.

5 What they're now going to do is try to relitigate
6 the issue to suggest and to confuse the jury that the tapes
7 found in 2017 are actually the tapes that have been found to
8 have been destroyed. So now we will be back to relitigating
9 this entire matter all over again.

10 That is the only purpose of this witness's
11 testimony. He has no knowledge of 2010, 2011, or the 2014
12 tapes that were found. All this is meant to do is to
13 confuse the jury to suggest that those tapes that were
14 destroyed or intentionally lost, as found by the Court as
15 part of the bad faith and intentional destruction, to
16 suggest that they still exist. That's all this is.

17 So now we're going to hear all about how he found
18 tapes in 2017 and how many there were, all for the
19 suggestion that they still exist.

20 MS. GITTES: May I respond, Your Honor?

21 THE COURT: You may.

22 MS. GITTES: So a few things.

23 Number one, this exhibit was offered into evidence
24 by Mr. Collyard and his colleagues, Exhibit 796. It was
25 part of the deposition testimony of Dave Scherer, who we

Stroble - Direct

1 heard on video a few days ago, maybe. I forget.

2 Mr. Scherer testified about finding tapes. This was their
3 exhibit.

4 They have accused the bank of deleting these
5 backup tapes. What we believe Mr. Stroble can testify to is
6 that there is a tape with the exact same name, lettering,
7 and information as the tapes Mr. Collyard claims were
8 deleted. He will be free to argue to the jury that those
9 are different tapes.

10 But what we're doing through Mr. Stroble, which
11 they had full notice of -- they deposed Mr. Stroble. He's
12 been on our list. This is their exhibit. To be able to --
13 they have accused the bank of deleting tapes in 2014. What
14 this testimony is designed to do is to show that tapes were
15 found in 2017, which -- documents from which were produced
16 in this litigation.

17 Mr. Collyard has put this at issue and what we're
18 doing is providing our good-faith explanation, our innocent
19 explanation, as to --

20 THE COURT: Shhh.

21 MS. GITTES: I apologize, Your Honor. -- our
22 innocent explanation as to what happened, consistent with
23 the Court's order.

24 MR. COLLYARD: No. What this goes to here -- what
25 the Court's order goes to is whether or not the documents

1 they destroyed were harmful, not whether or not they were
2 destroyed.

3 The reason why this is part of Mr. Scherer's
4 testimony is because we already had this fight and this was
5 inherent in the fight in order to prove that these documents
6 were not the same. I have proven multiple times at the
7 Bankruptcy Court level that they lied and that implicated
8 counsel.

9 So if she is now allowed to go through and
10 relitigate this entire issue, I cannot rebut that because I
11 would have to call the lawyers. I proved the destruction of
12 those tapes and I proved that their lawyers lied about these
13 tapes, to suggest that they were the same things, multiple
14 times. I am now precluded from doing this.

15 This came in through depo designations that you
16 guys counter designated as well with Mr. Scherer, which was
17 the issue of whether or not they were the same, which I
18 proved at the Bankruptcy Court level and you affirmed it.

19 So now we have a ruling by the Bankruptcy Court
20 that these are not the same, that those tapes were
21 destroyed, and now we're going to relitigate this issue
22 again, but I can't call their lawyers to reprove what I
23 already proved at the Bankruptcy Court level and what Your
24 Honor has already affirmed in an order.

25 MS. GITTES: A few points, Your Honor.

Stroble - Direct

1 First, just as a procedural matter, Mr. Stroble
2 has been on our witness list. He was first on their witness
3 list. If they had had an issue with Mr. Stroble's
4 testimony, this is the topic of what he was deposed on.
5 They could have raised this before and they chose not to in
6 order to raise it now.

7 Second, Mr. Collyard has made this argument
8 several times and the Court, to my understanding, has at
9 each point rejected it and allowed us to put on evidence of
10 our good-faith -- of our innocent explanation for what
11 happened.

12 This is not long testimony. He's going to testify
13 that he found the tapes. We're not going to touch conduct
14 of counsel. That's not going to be what happens. He,
15 Mr. -- just as a short proffer, Mr. Stroble finds tapes. He
16 identifies them in the picture that's already in evidence.

17 THE COURT: Keep your voice down.

18 MS. GITTES: I apologize.

19 He identifies them. The pictures are already in
20 evidence. He will testify as to how these tapes work. He
21 will provide them to -- he will testify that he provided
22 them to the vendor. And that's the extent of his knowledge.

23 THE COURT: And why is that relevant?

24 MS. GITTES: Because, Your Honor, plaintiffs have
25 put at issue this allegation that we destroyed tapes in

1 2014. This is directly probative to whether or not that is
2 true.

3 A tape -- according to the e-mail that
4 Mr. Collyard -- that is in evidence that was discussed with
5 Mr. Vanderheyden, the witness from this morning, it
6 specifically referenced a tape with "MSP105 Aug '07" on it.

7 What Mr. Scherer -- excuse me. What Mr. Stroble
8 will testify to is that he found a tape with the label
9 "MSP105" on it that said, "Aug '07." He will testify in his
10 experience there are never two backup tapes with the same
11 prefix and number.

12 MR. COLLYARD: I'm sorry. If I may, this -- and
13 this was litigated and this was why those depositions were
14 taken. They had to pay for them. The reason why he was
15 deposed was because BMO Harris Bank was sanctioned and I had
16 the opportunity to depose him on this matter to prove this.
17 And this was an issue at the Bankruptcy Court.

18 It doesn't say what she just said. It says, "Full
19 system backup." That is not in that e-mail. I specifically
20 asked Mr. Vanderheyden if he knew what the label was, and he
21 said the label is this. He did not say the label was that.

22 So now we're back to relitigating whether or not
23 the tapes in 2014 were actually destroyed. Two courts have
24 already concluded that that has happened, and Your Honor
25 affirmed that decision.

1 And so whether they were destroyed is not the
2 issue. Whether the information on the tapes was harmful and
3 whether there's an innocent explanation for destroying those
4 tapes is what Your Honor allowed by her order, not whether
5 or not these tapes are the same and whether they were
6 destroyed. This is completely outside of the scope of your
7 order, Your Honor.

8 THE COURT: I agree. And so I -- the objection is
9 sustained as to that line of questioning. I don't know
10 where you're going to go beyond that.

11 MS. GITTES: Your Honor, if I may? And I don't
12 mean to ask you to reconsider, but this is the sole --
13 Mr. Collyard has gotten up and accused the bank of deleting
14 tapes in 2014. This is directly probative to the truth of
15 that allegation.

16 Mr. Collyard is entitled to draw out on
17 cross-examination the differences between the two, but he
18 stood up at opening -- in opening statements and said tapes
19 were deleted in 2014. This is directly probative of that
20 not --

21 THE COURT: Shhh.

22 MS. GITTES: I apologize.

23 This is directly probative of that not happening.
24 And if we're unable to put on this evidence, respectfully, I
25 believe we're extremely prejudiced because we're not allowed

1 to provide any answer to the argument that Mr. Collyard --
2 the spoliation in the Court's -- and I was not involved at
3 the time. I'm not trying to relitigate this in front of
4 Your Honor, but it was about the decommissioning.

5 This 2014 deletion is a -- is something that came
6 in and was talked about in opening statements. It was --
7 this was not what we understood would be the scope of
8 spoliation.

9 But we have no choice but to put this evidence in
10 in order to -- otherwise the jury is left with the
11 impression that we deleted tapes and we're unable to put in
12 what is -- what this witness will testify to, that he found
13 a tape that he will testify -- and Mr. Collyard is free to
14 try to attack his credibility, but these are the same tapes
15 that he -- that were found in 2014.

16 THE COURT: How can he establish that these are
17 the same tapes that were found in 2014?

18 MS. GITTES: What he can do is -- he worked at the
19 same location as Mr. Scherer, in the Centre Point location.
20 He can testify that he found a tape with this label that
21 matches what the tape -- well, what is in Mr. Vanderheyden's
22 e-mail that we saw this morning. He can testify that, in
23 his experience, it is impossible for two backup tapes to
24 have the same prefix and number because they are assigned by
25 a system.

Stroble - Direct

1 And so it is his having worked with backup tapes
2 through the course of his employment at M&I and BMO Harris
3 that this is in his view -- he can never be in Mr. Scherer's
4 head, but what he can do is say I found and provided a tape
5 with exactly the same prefix and number as the tape that
6 Mr. Collyard has accused the bank of deleting.

7 MR. COLLYARD: Your Honor, that is not true.
8 Again, the label is not that. But this, respectfully --

9 THE COURT: You said the label is what?

10 MR. COLLYARD: I'm sorry. So the label in the
11 e-mail that I showed Mr. Vanderheyden -- and this was
12 already litigated, it was already ruled on by the Court --
13 did not include anything about a full system backup. That
14 was a major issue at the Bankruptcy Court level that we had
15 hearings on where there were findings by the Court and it
16 was decided.

17 I didn't have the opportunity to take
18 Mr. Stroble's deposition on this particular issue because --
19 what I took his deposition on was whether or not those tapes
20 were destroyed. And there is a finding by the Court that
21 those tapes were destroyed, not these.

22 And so, again, what the issue is is whether or not
23 that -- you've already found, the Court has already
24 concluded that there was destruction in 2010 and 2014, and I
25 stood up and I said in opening statements that there were

1 because you have already decided that those tapes were
2 destroyed.

3 And you will give a permissive adverse inference,
4 but you will allow them to put on limited evidence of an
5 innocent explanation as to why the tapes that were destroyed
6 were not harmful to BMO, not relitigating this issue as to
7 whether or not these tapes still exist and those other ones
8 were destroyed, because it has already been found that they
9 were destroyed.

10 And the only reason for this witness's testimony,
11 as I understand what I just heard from your direct, is to
12 now redo what the Court has already decided was done and
13 destroyed.

14 And I can't call their lawyers. I can't redo this
15 entire issue, which I spent months doing through deposing
16 lawyers, through arguing briefs, through findings of the
17 Bankruptcy Court that they lied in documents, that they lied
18 in letters multiple times to the Bankruptcy Court. That's
19 how I proved that.

20 MS. GITTES: May I respond, Your Honor?

21 (The Court and law clerk confer)

22 THE COURT: Go ahead.

23 MS. GITTES: Thank you. First of all, I have the
24 deposition of Mr. Stroble here. Mr. Collyard had ample
25 opportunity to ask him about this exact topic.

Stroble - Direct

1 MR. COLLYARD: This was years ago, right, this was
2 a deposition years ago?

3 MS. GITTES: 2018.

4 MR. COLLYARD: Yeah.

5 MS. GITTES: Second of all, we have now put
6 Mr. Stroble on the stand. We have shown the jury that we
7 believe he has backup tapes. They could have raised this
8 issue sooner. They chose not to.

9 MR. COLLYARD: I didn't know what you were going
10 to ask him on the stand.

11 MS. GITTES: The only topic of his deposition is
12 are these tapes. You put this document in evidence.

13 MR. COLLYARD: Your Honor --

14 THE COURT: Okay. Let's -- I think I understand
15 what the issue is.

16 MR. COLLYARD: Okay.

17 THE COURT: The objection is sustained.

18 MR. COLLYARD: Thank you, Your Honor.

19 MS. GITTES: Your Honor, can I -- may I have a --
20 I need to talk to my colleagues, if that's okay, to
21 understand what, if anything, we're going to do with
22 Mr. Stroble given the scope of your ruling.

23 THE COURT: What do you mean?

24 MS. GITTES: Would it be okay to take an afternoon
25 break right now?

Stroble - Direct

1 THE COURT: We are not --

2 MS. GITTES: I'm going to go -- just two minutes,
3 Your Honor? Because I don't -- this witness has nothing
4 else to testify to.

5 THE COURT: So then he can step down. If you want
6 to re-call him later, you may.

7 MS. GITTES: I'll just take one minute, if that's
8 okay. I just need to ask my colleagues very quickly.

9 (Pause)

10 **(In open court)**

11 MS. GITTES: Thank you, Mr. Stroble. May I
12 proceed, Your Honor?

13 THE COURT: Yes. I believe the objection is
14 sustained. I want to make sure that's on the record.

15 BY MS. GITTES:

16 Q. I'll just ask you a few questions, Mr. Stroble, about
17 backup tapes generally.

18 I think you testified before we broke that you
19 were generally familiar with backup tapes in your time at
20 BMO Harris and M&I; is that right?

21 A. Yes.

22 Q. And I think -- can you just explain -- I think you said
23 it before, but I apologize, I've lost my train of thought --
24 as to what backup tapes capture.

25 A. They capture a backup of what is digitally on the server

by which it is used to back up.

Q. And you started at the bank in March of 2010, right?

A. Yes.

Q. And are you familiar with where the bank -- and so this would be M&I at the time -- had servers at that time?

A. Yes.

Q. Where do you recall the bank having servers?

A. We had servers regionally distributed in Naples, Florida; St. Louis, Missouri; Minneapolis, Minnesota; Madison, Wisconsin; I believe there was one also in Arizona somewhere that either -- was either just being shut down or it had already been shut down when I joined the bank; as well as the Milwaukee area.

Q. And so you referenced shutting down. Are these regional servers still in place today?

A. They are not, no.

Q. Why not?

A. The content of them was for Lotus Notes e-mail and that application was consolidated down into the two Milwaukee data center locations that M&I had.

Q. So do you -- so was there a project to consolidate servers, then --

A. Yes.

Q. -- based on your recollection?

MR. COLLYARD: Objection, Your Honor, cumulative

1 of Mr. Vanderheyden's testimony.

2 THE COURT: Sustained.

3 BY MS. GITTES:

4 Q. Do you recall, in connection with the consolidation,
5 whether any servers, backup tapes, or other materials were
6 deleted or recycled?

7 MR. COLLYARD: Same objection, Your Honor.

8 THE COURT: Sustained.

9 BY MS. GITTES:

10 Q. So a backup tape -- turning back to your time in
11 early -- I guess early in your time at the bank, so in the
12 2010, 2011 time period, do you know how often backup tapes
13 were created?

14 A. They were typically done nightly.

15 Q. And in your experience, are backup tapes reused?

16 MR. COLLYARD: Again, Your Honor, objection,
17 cumulative of Mr. Vanderheyden's entire testimony.

18 THE COURT: Sustained.

19 BY MS. GITTES:

20 Q. Can you tell what's on a backup tape just by looking at
21 it?

22 A. No, you cannot.

23 Q. Why not?

24 A. Because it's stored on the tape digitally, just like I
25 couldn't look at my -- the outside of my cell phone and tell

1 you what's on it. You'd have to have something to read it.

2 Q. And you became familiar -- were you familiar in your
3 time at the bank with how backup tapes were labeled?

4 A. Yes.

5 Q. And generally what kind of labeling system did the bank
6 use for backup tapes, again, back in the 2010 to 2013 time
7 period?

8 MR. COLLYARD: Objection, Your Honor, cumulative
9 of Mr. Vanderheyden's testimony.

10 THE COURT: Sustained.

11 BY MS. GITTES:

12 Q. Are you aware of -- there's one --

13 MS. GITTES: May I approach, briefly, Your Honor,
14 just to clarify where I'm going?

15 THE COURT: You may.

16 **(At sidebar)**

17 MS. GITTES: The one thing that Mr. Vanderheyden
18 was not able to testify to, which is how the numbering
19 system worked, and so what I'd like to do is elicit
20 testimony from him as to how that worked, but I can't do
21 that without asking him a few questions to sort of set the
22 stage.

23 MR. COLLYARD: I don't understand what -- how the
24 numbering system worked for what? For the 2017 --

25 MS. GITTES: For backup tapes in his experience

Stroble - Direct

1 and time at the bank.

2 MR. COLLYARD: This witness has no knowledge of
3 the backup tapes from 2010, 2011, or 2014. So this is
4 entirely irrelevant testimony.

5 And anything about backup tapes at this point in
6 time would be -- if he had knowledge, which he doesn't,
7 would be cumulative of Mr. Vanderheyden's testimony. We are
8 wasting the jury's time at this moment.

9 MS. GITTES: It's -- respectfully, it's not
10 cumulative. Mr. Vanderheyden was not --

11 THE COURT: Shhh.

12 MS. GITTES: Mr. Vanderheyden was not familiar,
13 because of his seniority at the bank, with how backup tapes
14 were -- how the numbering system was assigned. All I want
15 to do is elicit that from Mr. Stroble.

16 MR. COLLYARD: There's no evidence of anything
17 about what these backup tapes said or what their labels were
18 or anything about them from 2010, 2011, or 2014. So this
19 witness has absolutely no foundation or no knowledge about
20 any of it.

21 THE COURT: And why is it relevant? I agree with
22 foundation and all of that. I want --

23 MS. GITTES: Mr. Vanderheyden, there was a gap in
24 his testimony as to how the numbering system worked. All
25 I'm trying to do is close that gap because Mr. Stroble has

1 that knowledge as a more -- as a person who dealt with the
2 backup system directly versus Mr. Vanderheyden, who was at a
3 higher level.

4 MR. COLLYARD: And the answer would be it wouldn't
5 be relevant. The only thing would be to again suggest
6 somehow that these tapes in 2017 that they found are somehow
7 to confuse the jury to believe that those tapes weren't
8 destroyed in 2014 or 2010 or 2011. That's the only purpose
9 for this line of questioning.

10 THE COURT: The objection is sustained.

11 **(In open court)**

12 BY MS. GITTES:

13 Q. I'm almost finished, Mr. Stroble.

14 You said you worked with -- before you started
15 working from home, where did you work?

16 A. The location called Centre Point.

17 Q. And did Mr. Scherer work there as well?

18 A. Yes.

19 MS. GITTES: Just one moment.

20 (Pause)

21 BY MS. GITTES:

22 Q. Just to wrap up, in your ten-plus years at the bank,
23 have you ever intentionally deleted or altered documents
24 with the purpose of preventing their disclosure in a
25 litigation or other court proceeding?

1 A. No.

2 Q. What would happen if you did that?

3 A. I would lose my job and could see legal ramifications to
4 that.

5 Q. You testified earlier that you have a team -- you worked
6 with a team of colleagues at M&I and later at BMO Harris.
7 Have you ever become aware of any of those employees
8 intentionally deleting or altering documents for the purpose
9 of avoiding their disclosure in a court proceeding or other
10 litigation?

11 MR. COLLYARD: Objection, leading, argumentative,
12 and foundation.

13 THE COURT: Sustained.

14 MS. GITTES: Just one moment, Your Honor, and I
15 think I'm wrapped up.

16 (Defendant's counsel confer)

17 MS. GITTES: No further questions at this time.
18 Thank you, Your Honor.

19 MR. COLLYARD: I have no questions for this
20 witness, Your Honor. Thank you.

21 THE COURT: Sir, you are excused.

22 MS. MOMOH: Good afternoon, Your Honor.

23 THE COURT: Good afternoon.

24 MS. MOMOH: Adine Momoh on behalf of the
25 defendant, BMO Harris Bank. Given the time and the fact

1 that we need to switch things around on the table, may we
2 just have about five minutes before we proceed?

3 THE COURT: Yes.

4 MS. MOMOH: Thank you, Your Honor.

5 (Pause)

6 MS. MOMOH: Permission to approach, Your Honor?

7 THE COURT: Yes.

8 (Binders handed to Court)

9 THE COURT: Counsel, are we ready to proceed?

10 MS. MOMOH: Just maybe two minutes, Your Honor,
11 please?

12 THE COURT: Okay.

13 MS. MOMOH: Thank you.

14 THE COURT: Members of the Jury, if you'd like to
15 take a stretch break, you should feel free to stretch at
16 your seats.

17 (Pause)

18 MS. MOMOH: Your Honor, Defendant BMO Harris Bank
19 calls as our next witness Mr. Thomas Haller.

20 THE COURT: Thank you.

21 THE COURT REPORTER: Please raise your right hand.

22 (Witness sworn)

23 THE COURT REPORTER: You can have a seat in the
24 witness chair. Once you're seated, could you please state
25 your full name, spelling your first and your last name.

Haller - Direct

1 THE WITNESS: Hi. My name is Thomas Haller,
2 T-h-o-m-a-s, last name H-a-l-l-e-r.

3 THE COURT: Thank you, Counsel. You may proceed.

4 MS. MOMOH: Thank you, Your Honor.

5 (Thomas Haller)

6 DIRECT EXAMINATION

7 BY MS. MOMOH:

8 Q. Good afternoon, Mr. Haller.

9 A. Hello.

10 Q. I hope that you are doing well.

11 A. I am. Thank you.

12 Q. And you remember me? My name is Adine Momoh. Again, I
13 represent BMO Harris Bank.

14 A. Yes.

15 Q. Thank you for being with us this afternoon.

16 Where do you currently work?

17 A. I work for BMO Harris Bank.

18 THE COURT: Mr. Haller, would you pull the base of
19 the microphone a little bit closer so that I can hear you.

20 THE WITNESS: Better?

21 THE COURT: That is better for me. Thank you.

22 THE WITNESS: Okay. Thanks.

23 BY MS. MOMOH:

24 Q. Now, BMO Harris Bank is named and known as BMO Harris
25 Bank, but at a time its predecessor was M&I Bank, correct?

1 A. Yes.

2 Q. And you also worked at M&I?

3 A. Yes, I did.

4 Q. M&I and BMO combined, in total how many years have you
5 worked at the bank collectively?

6 A. Approximately 25 years.

7 Q. What brought you to M&I?

8 A. My wife and I were relocating from the East Coast and I
9 was looking for employment. I had interviews with a couple
10 of financial institutions in Milwaukee and ultimately chose
11 a position with M&I Bank.

12 Q. Focusing on your time at M&I, can you please explain
13 generally what positions you held.

14 A. Sure. When I first started, I was a product analyst. I
15 helped to design products for offering in our remote data
16 center locations across the country. I then became a
17 support team manager. I helped install an automated check
18 adjustment system. I was an operations manager. I became a
19 full-time project leader. And then my last position was as
20 the manager of the check fraud detection department.

21 Q. Okay. And I want to focus on some of the later roles
22 that you mentioned.

23 My understanding is that you also held a position
24 in M&I's Fraud Detection Group?

25 A. Yes.

Haller - Direct

1 Q. And then you were later promoted to vice president of
2 fraud detection?

3 A. Yes.

4 Q. When was the Fraud Detection Group created at M&I?

5 A. I believe it was 2001, 2002 time frame.

6 Q. Mr. Haller, do you understand that you are here today to
7 testify about M&I's fraud detection monitoring during the
8 relevant period of 2002 to 2008?

9 A. Yes.

10 Q. Can you explain, what is fraud detection?

11 A. Fraud detection is a dedicated group of people designed
12 to protect the bank and its customers against fraudulent
13 activity that occurs through bank accounts.

14 Q. And you talked about the people that are tasked, charged
15 to do that sort of work. But just taking a step back, the
16 concept of fraud detection, what is that?

17 A. Well, the idea is to identify fraud that's being
18 perpetrated against M&I customer accounts and to be able to
19 mitigate -- identify and mitigate that activity.

20 Q. What drew you to the field of fraud detection?

21 A. Initially I was the project manager to implement this
22 tool and I was very excited about the opportunity about this
23 new software, and ultimately I posted for and became the
24 manager of that department.

25 Q. So how did you become familiar with check processing?

Haller - Direct

1 A. I had been involved with check processing for a number
2 of years.

3 Prior to joining M&I I was at the Federal Reserve
4 Bank of Boston, and the first job that I had there was in
5 check adjustment and that, I guess, was my initial exposure
6 to check processing, was with the Federal Reserve Bank.

7 The fed is a provider of services and a regulator,
8 and I worked in the operations group with the fed to get my
9 initial exposure with checks.

10 Q. When did you become familiar with the mechanics of check
11 processing?

12 A. Well, I think a part of it stemmed with my work done at
13 the fed. Member financial institutions would send their
14 checks and clear them through the Federal Reserve. At that
15 time the Federal Reserve was the largest check clearing
16 organization in the country and so there was a lot of energy
17 and effort put into clearing checks. That was any initial
18 exposure. And it's part of, I think, why I was hired at
19 M&I, was that prior experience at the fed in check
20 processing.

21 Q. Okay. And we'll talk about that experience with the
22 Federal Reserve in Boston in a few moments, but just
23 focusing on your time at M&I, over what period of time were
24 you the vice president of fraud detection?

25 A. Approximately 2002 until I left the bank in 2012.

Haller - Direct

1 Q. What were your job responsibilities as the vice
2 president of fraud detection?

3 A. Well, I was responsible for managing and training the
4 staff. I was responsible for developing and managing the
5 software tool. I was responsible for all the reporting of
6 the department for check fraud-related activity, exposure,
7 loss, loss avoidance.

8 We were also responsible for reconciling the
9 general ledger account for check fraud losses that were
10 incurred with the bank. The reason being is that was kind
11 of the backside of the check fraud activity, was
12 understanding the losses that we were taking in order to
13 help drive the effectiveness of the tool.

14 Q. And you say "of the tool." What tool are you referring
15 to?

16 A. I'm sorry. That's the software that we used in check
17 fraud detection.

18 Q. What's the name of that software?

19 A. The name of it is -- it was by a company called
20 Carreker, C-a-r-r-e-k-e-r.

21 Q. Okay. And we'll get into that --

22 A. Okay.

23 Q. -- a few moments later.

24 So you did say earlier that you would manage
25 employees as part of your role as vice president of fraud

Haller - Direct

1 detection. So did you supervise bank employees at M&I --

2 A. Yes.

3 Q. -- in that role?

4 A. Yes.

5 Q. How many?

6 A. Well, it changed over time, but I would guess that --
7 maybe 20 to 25 in total.

8 Q. What was the extent of your managing or your supervision
9 of these employees?

10 A. I'm sorry. I don't understand the question.

11 Q. Sure. So you said that you supervised the employees at
12 M&I in your role as vice president of fraud detection. How?

13 A. Well, we were responsible -- I was responsible for
14 making sure that they were trained, that they were fluid in
15 the processes and procedures of the department, that they
16 understood the goals that we were trying to achieve, and
17 that they were executing to meet standards.

18 Q. How would you determine if they were executing to meet
19 standards?

20 A. Well, we would quality control their work and review and
21 get feedback from the employees. We also had annual reviews
22 from corporate audit to make sure that we were meeting
23 overall standards.

24 The group, it was myself and I also had a couple
25 of supervisors. And they had also a hands-on responsibility

Haller - Direct

1 in training the employees, making sure that they were
2 completing their work and that they were doing it according
3 to process and procedures.

4 Q. Based on what you just testified to, were you involved
5 in the evaluation of the employees that you were
6 supervising?

7 A. Yes.

8 Q. How so?

9 A. I would write the annual reviews. I would do
10 performance checkups with them. That all was part of my
11 responsibility.

12 Q. I had asked you about what drew you to the world of
13 fraud detection, and you had mentioned that you were
14 involved in implementing the Fraud Detection Group. Can you
15 tell me more about that.

16 A. About the implementation?

17 Q. Yes, please.

18 A. Yes. It stemmed out of a growing trend that was going
19 on across the country. At that time --

20 Q. What time?

21 A. The 2002 time frame. -- there was a dramatic increase
22 in check fraud activity related to scams, job scams, other
23 things like that, and there was a -- there was a big
24 increase in check fraud.

25 The bank wanted to protect itself and its

~~Haller - Direct~~

1 customers from this increase in activity, and so the end
2 result was to implement this software and get a staff
3 together to specifically address this issue with the bank.

4 Q. The software being the Carreker fraud system?

5 A. Yes.

6 Q. What is your understanding about why M&I implemented the
7 Fraud Detection Group in 2002?

8 A. Well, as I had mentioned, check fraud was a phenomenon
9 that was occurring that was increasing across the country.
10 Larger financial institutions -- large and small financial
11 institutions were seeing an increase in check fraud activity
12 and losses according -- losses as a result of this increase.

13 And so the bank wanted to take action in order to
14 meet this new threat and combat the activity to avoid losses
15 for customers and the bank itself.

16 Q. You testified that you have been with M&I and now BMO
17 for 25 years. Have you worked for the bank throughout that
18 nearly 25-year period without interruption?

19 A. No. In --

20 Q. Explain.

21 A. I'm sorry. In 2012 I left the bank and got a job at a
22 company called Fiserv, F-i-s-e-r-v. They are a financial
23 services technology company, and they also were the company
24 that was the -- is the current owner of that software. And
25 I took a job with them. I was there for about four years.

Haller - Direct

1 I worked in the role of sales support and product
2 development. And, like I said, I was with Fiserv for about
3 four years and then came back and rejoined the bank.

4 Q. So why did you leave M&I to join Fiserv?

5 A. BMO Harris had acquired M&I Bank. There was a similar
6 process to what we were doing at M&I at BMO Harris Bank, and
7 there was an individual who had basically the same job that
8 I had. My future was uncertain and so I made the decision
9 to look for other opportunities and got the job at Fiserv.

10 Q. And then you left Fiserv to join BMO Harris Bank?

11 A. Yes.

12 Q. That was in approximately 2016?

13 A. 2016 is correct.

14 Q. Tell the jury, why did you leave Fiserv to join BMO
15 Harris Bank?

16 A. Well, the job that I had involved a lot of travel,
17 including international. It was very unpredictable. And
18 after four years on the road, I wanted to be home at night.
19 And so I started putting feelers out and eventually got a
20 job at BMO Harris.

21 Q. When you joined BMO in 2016, what was your job title at
22 that time?

23 A. I was the manager of the AML, anti-money laundering,
24 Investigations Unit.

25 Q. Was your direct title vice president of investigations

1 in AML?

2 A. Yes.

3 Q. From when to when were you in that role?

4 A. Well, I have been promoted since I have been there, but
5 I'm basically in that role to this day.

6 Q. Before your promotion, though -- your promotion was in
7 2019?

8 A. Yeah, I think it was about three years. That's right.

9 Q. Okay. What's your current job title?

10 A. I am vice president and senior manager of the Anti-Money
11 Laundering Investigations Unit.

12 Q. Okay. So when -- you were vice president of
13 investigations in AML at BMO. Now you're vice president and
14 senior manager of the AML Investigations Unit. Was that a
15 promotion?

16 A. Yes.

17 Q. What are your current job responsibilities?

18 A. I manage the primary investigations -- AML
19 Investigations Unit for BMO Harris Bank.

20 Q. Just to be clear, there's been discussion in this case
21 about AML analysts and the AML Monitoring Group.

22 When you were the vice president of the Fraud
23 Detection Group, you were not a member of the AML Monitoring
24 Group, correct?

25 A. That is correct.

1 Q. When did you learn that Tom Petters and his entities,
2 including PCI, were involved in the PCI Ponzi scheme?

3 A. It was basically before I was to be deposed -- in 2018?

4 Q. In 2018, then, how did you come -- so how, how did you
5 come to learn about the PCI Ponzi scheme?

6 MR. IHRIG: Objection, Your Honor, relevance.

7 THE COURT: Overruled.

8 THE WITNESS: Again, it was through me being named
9 to be deposed in this case.

10 BY MS. MOMOH:

11 Q. Are you aware now that eventually Tom Petters, Deanna
12 Coleman, and a number of other people went to jail for their
13 role in the PCI Ponzi scheme?

14 A. I am now, yes.

15 Q. Did you know that the PCI Ponzi scheme was underway
16 before it was discovered by the authorities in 2008?

17 A. No, I did not.

18 Q. BMO is now accused of aiding and abetting PCI with
19 respect to the PCI Ponzi scheme and --

20 MR. IHRIG: Objection, calls for a legal action.

21 THE COURT: Counsel, why don't you approach.

22 Well, I'll overrule it at this point and you can ask the
23 question.

24 MS. MOMOH: Thank you, Your Honor.

25 BY MS. MOMOH:

1 Q. Let me restart my question. BMO is now accused of
2 aiding and abetting PCI with respect to the PCI Ponzi
3 scheme, and the Fraud Detection Group that you supervised
4 and their work is being questioned.

5 What was the culture of your Fraud Detection Group
6 during the 2002 to 2008 period?

7 MR. IHRIG: Objection, compound. Foundation as
8 well.

9 MS. MOMOH: Your Honor, if I may be heard briefly,
10 I've already laid the proper foundation with his role of
11 managing, supervising, and training employees and --

12 THE COURT: Let's talk at sidebar. We don't need
13 to do that in front of the jury.

14 MS. MOMOH: Sure.

15 **(At sidebar)**

16 MS. MOMOH: Your Honor --

17 THE COURT: Let's wait until all of the lawyers
18 are here.

19 MS. MOMOH: Sure.

20 THE COURT: Don't start arguing until all the
21 lawyers are here.

22 MS. MOMOH: Well, wait a minute. Why are you
23 here, if you don't mind? Isn't Mr. Ihrig the one --

24 MR. COLLYARD: I can be here.

25 MS. MOMOH: Understood. That's fine.

Haller - Direct

1 THE COURT: I know it is. It's my bench.

2 MS. MOMOH: Yes.

3 I've laid the proper foundation with respect to
4 Mr. Haller testifying as to the culture of his group. He
5 testified that he was the vice president of the Fraud
6 Detection Group for several years. He testified that he
7 managed, supervised, hired, trained, and evaluated the
8 employees within his group. He mentioned the supervisors
9 over him. I'm simply asking about the culture of the group.

10 And Mr. Ihrig's objection was with respect to
11 foundation and I believe a compound question. So I can
12 certainly break up the question if need be, but I have
13 established foundation.

14 MR. IHRIG: Your Honor, the question improperly
15 imposes -- interposes a narrative lead-in about the
16 allegations in this case, to which this witness has no
17 foundation to testify about, and then it improperly compares
18 them to his job responsibilities at M&I. There's no
19 correlation between the two, and he doesn't have foundation
20 to speak to the correlation between the two.

21 THE COURT: I didn't understand -- what is your
22 question?

23 MS. MOMOH: I don't have a question. Oh, the
24 question I'm asking?

25 THE COURT: That's being objected to.

Haller - Direct

1 MS. MOMOH: What's the culture of the Fraud
2 Detection Group, Your Honor, was the question.

3 THE COURT: Okay. So he's talking about it now?

4 MS. MOMOH: I asked during the period of 2002 to
5 2008, which was the period of time when he was vice
6 president of that group.

7 MR. IHRIG: And the objection is to the narrative
8 lead-in to that question in which she recited allegations of
9 aiding and abetting that are made in this case that have
10 nothing to do with the culture of Mr. Haller's group at M&I
11 in 2008.

12 THE COURT: But you didn't object to those
13 questions.

14 MR. IHRIG: I believe I did, Your Honor.

15 THE COURT: Okay. Okay. So you may ask the
16 question.

17 MS. MOMOH: Thank you.

18 THE COURT: The objection is overruled.

19 MS. MOMOH: Thank you.

20 **(In open court)**

21 MS. MOMOH: Your Honor, the objection was
22 overruled?

23 THE COURT: Yes.

24 MS. MOMOH: Thank you.

25 BY MS. MOMOH:

Haller - Direct

1 Q. Mr. Haller, again, what was the culture of your Fraud
2 Detection Group?

3 A. We were a very enthusiastic, very dedicated group of
4 individuals.

5 Q. Why do you say that?

6 A. We were excited to do the work that we were doing. We
7 felt that we were making a difference. This was new. It
8 was a little exciting. And, like I said, we wanted to
9 perform well. We were a dedicated group, enthusiastic about
10 the challenges ahead of us, and we wanted to perform well.

11 Q. Was that your understanding of the Fraud Detection Group
12 throughout the entire time that you were a member of that
13 group?

14 A. Absolutely. It was a very desirable position, to work
15 in fraud detection. There were a lot of other operations
16 groups that did various functions for the bank, but there
17 were always people that wanted to join our team and be a
18 part of the Fraud Detection Group.

19 Q. How were members of the Fraud Detection Group evaluated
20 as it relates to fraud detection?

21 A. Well, there are -- there are a few things.

22 One is we were evaluated against policy and
23 procedure. We were evaluated with our ability to get our
24 work done in a timely manner. We were evaluated by
25 corporate audit to make sure that we were following the

Haller - Direct
1 processes as defined.

2 And we also evaluated our performance. I had
3 mentioned earlier about losses that were recorded by the
4 bank for check fraud, and we were responsible for
5 reconciling that general ledger.

6 That was very important for us because if we had
7 missed something and a loss was taken by the bank, we wanted
8 to understand that loss and understand -- if we needed to
9 make a change that was in our software and our procedure, to
10 make sure that we understood how it happened and that we
11 would do our best to make sure that it didn't happen again.

12 And the other aspect is that we also evaluated
13 ourselves against peer banks in the industry through
14 industry groups that M&I Bank belonged to.

15 Q. And we'll talk about the evaluation with respect to
16 peers of the bank. I want to focus on what you mentioned
17 about evaluation with respect to losses.

18 Would that -- what about losses compared to loss
19 avoidance? Are those two separate things?

20 A. Loss avoidance would be the exposure to loss, but our
21 actions have mitigated the loss and eliminated that from
22 occurring. So, yes, we wanted to have a very high loss
23 avoidance ratio to losses. So, yes, those two are related.
24 The opposite ends, I guess, of that spectrum.

25 Q. Generally speaking, what do you mean by "loss"?

Haller - Direct

1 A. Loss is a financial loss to the bank for this fraudulent
2 activity.

3 Q. You mentioned the Corporate Audit Group. So just to
4 kind of paint a picture for the jurors, you -- we have the
5 AML Monitoring Group, correct? I'm just trying to paint the
6 picture. So you have the AML Monitoring Group on one end,
7 correct?

8 A. Yes.

9 MR. IHRIG: Objection, vague as to time.

10 THE COURT: Sustained.

11 BY MS. MOMOH:

12 Q. Let's stick with 2002 to 2008. So you have the AML
13 Monitoring Group. The Fraud Detection Group, you said, was
14 not in the AML Monitoring Group, correct?

15 A. That is correct.

16 Q. Where -- in what department was the Fraud Detection
17 Group?

18 A. The Fraud Detection Group reported through the corporate
19 security team.

20 Q. The Corporate Securities Department?

21 A. Yes.

22 Q. Okay. So we have the AML Monitoring Group on one side.
23 We have the Fraud Detection Group on another, which is
24 underneath the Corporate Securities Department. Where would
25 the audit -- the Corporate Audit Group be that you just

Haller - Direct
referenced?

A. Audit is its own entity. They are an independent internal group that -- their responsibility is to audit operating areas around the bank to ensure compliance with policy, procedure, regulation, et cetera, acting as an independent arm to evaluate processes and procedures and performance.

Q. How did the Fraud Detection Group operate with the Audit Group during the period of 2002 to 2008?

A. Well, we considered corporate audit to be a strategic partner, and I had invited the corporate audit team to be a part of actually the strategic development of the fraud detection team of the deployment of the software.

So we worked hand in hand and I kept them informed of the activities that we were doing when we initially started, and they continued to be a strategic partner for us in fraud detection in our ongoing management of the systems and the procedures for the department.

Q. What would have happened to you and your colleagues in the Fraud Detection Group during the period of 2002 to 2008 if you ignored fraud that was going through M&I's accounts?

MR. IHRIG: Objection, calls for speculation, foundation.

THE COURT: Sustained.

BY MS. MOMOH:

Haller - Direct

1 Q. Mr. Haller, do you know what would have happened to you
2 personally during the 2002 to 2008 period if you would have
3 ignored fraud going through M&I's accounts?

4 MR. IHRIG: Same objection, calls for speculation.

5 THE COURT: Sustained.

6 BY MS. MOMOH:

7 Q. Mr. Haller, during the 2002 to 2008 period when you were
8 the vice president of the Fraud Detection Group, did you
9 ever ignore fraud that was going through M&I's account at
10 that time?

11 A. Never.

12 Q. To your knowledge, did any of your employees that you
13 managed, trained, evaluated, and hired, did any of them
14 ignore fraud that was going through M&I's account during the
15 2002 to 2008 period?

16 A. No.

17 Q. Before we talk more about your role at the bank, can you
18 please tell the jurors what state you live in.

19 A. I live in Wisconsin.

20 Q. What city?

21 A. Wauwatosa.

22 Q. That's always a fun one for me to say, "Wauwatosa," and
23 I'm getting --

24 A. Right. It's a suburb of Milwaukee.

25 Q. Okay. Where did you grow up?

1 A. I grew up in Wausau, Wisconsin.

2 Q. Are you married?

3 A. I am.

4 Q. How long have you been married?

5 A. I should know this exactly. I believe 34 years.

6 Q. And I believe you celebrated an anniversary last month?

7 A. Yes, September.

8 Q. Okay. Congratulations.

9 A. Oh, thank you.

10 Q. Any children?

11 A. We have a son.

12 Q. How old is he?

13 A. He's 30.

14 Q. What does he do?

15 A. He is a musician.

16 Q. Now, you haven't spent your entire life in Wisconsin,
17 right?

18 A. That is correct.

19 Q. Did you ever spend time abroad?

20 A. Yes.

21 Q. Okay. So my understanding is that you spent time abroad
22 after high school; is that right?

23 A. Yes. I spent six months in Paris. I went to school
24 there. It was a school for foreigners to learn the language
25 and then also to take cultural classes as well.

Haller - Direct

1 Q. Was that program connected to an institution in
2 Minnesota?

3 A. Yes, it was.

4 Q. And which institution?

5 A. Saint Teresa College in Winona, Minnesota.

6 Q. When did you graduate from college?

7 A. 1993 or 1994.

8 Q. Where did you graduate from college?

9 A. University of Wisconsin-Milwaukee.

10 Q. What degree did you receive?

11 A. I have a bachelor's degree in economics.

12 Q. You lived in Wisconsin, as you mentioned. You live in
13 Wisconsin currently. You spent some time in Paris. You
14 also spent time in Boston and Connecticut?

15 A. Yes.

16 Q. Please tell the jury briefly what brought you to Boston
17 and Connecticut.

18 A. I had met my now wife shortly before she made a move to
19 go to Boston. She was a registered nurse and had got a job
20 at Boston Children's Hospital. We dated for a couple of
21 weeks and she made the move out to Boston. After a year and
22 a half, two years of long-distance love, I took a job out in
23 Boston.

24 Q. Was that the Federal Reserve Bank position in Boston
25 that you mentioned earlier?

Haller - Direct

1 A. Yes.

2 Q. Why did you decide to work with the Federal Reserve Bank
3 in Boston?

4 A. I just thought it was a great opportunity to get the
5 macro perspective of the banking industry. As I mentioned,
6 I was an economics major. The Federal Reserve plays a
7 significant role in the nation's economy, and I thought it
8 would be a great education for me, a great opportunity.

9 Q. What were your job responsibilities at the Federal
10 Reserve of Boston?

11 A. Well, I started out in the check adjustment department,
12 as I had mentioned earlier. I was responsible for fixing
13 check errors of member institutions as they -- as the check
14 processing took place. So I worked in that job for probably
15 a year or a year and a half.

16 I then took a job doing reserve account analysis.
17 Member financial institutions have to keep a reserve balance
18 at the fed, and my job was to help calculate and monitor the
19 balances that institutions were keeping with the fed.

20 I took a job with the loan and credit department.
21 I was responsible for the state of Connecticut loan
22 collateral warehouses for a couple of distressed financial
23 institutions. This was during the junk bond era, and there
24 were some financial institutions that had made some bad
25 investments in real estate and other such things and they

Haller - Direct

1 came to the fed as the lender of last resort. I managed
2 several, maybe half a dozen loan collateral warehouses,
3 money that the banks were borrowing from the fed.

4 And I had another job at the -- after that. I
5 apologize. I don't remember exactly what it was. I don't
6 remember what it was right now.

7 Q. That's just fine.

8 A. Okay.

9 Q. So you mentioned Boston, and then you also mentioned
10 Connecticut as part of your position with the Federal
11 Reserve in Boston. What led you to Connecticut?

12 A. Thank you.

13 MR. IHRIG: Objection, Your Honor, relevance.

14 THE COURT: Sustained.

15 BY MS. MOMOH:

16 Q. Mr. Haller, besides your experiences at M&I, BMO,
17 Fiserv, and the Federal Reserve of Boston, were there any
18 other jobs that you've held in the banking industry?

19 A. Well, I started out as a teller at a local bank that is
20 now part of -- oh, my gosh. Anyway, I started out as a
21 teller when I -- my very first banking job was a teller
22 position.

23 THE COURT: Members of the Jury, we will take our
24 midafternoon break now. Please be ready to return to the
25 courtroom at 3:25.

1 (Jurors excused)

2 **IN OPEN COURT**

3 **(JURY NOT PRESENT)**

4 THE COURT: We are in recess. Let's get to the
5 substance --

6 MS. MOMOH: Thank you, Your Honor.

7 THE COURT: -- and be mindful of the jury's time.

8 (Recess taken at 3:12 p.m.)

9 * * * * *

10 (3:30 p.m.)

11 **IN OPEN COURT**

12 **(JURY PRESENT)**

13 THE COURT: Thank you. You may be seated.

14 Counsel, you may proceed.

15 MS. MOMOH: Thank you, Your Honor.

16 THE COURT: You're welcome.

17 BY MS. MOMOH:

18 Q. Mr. Haller, before the last break you were telling the
19 jury that you were also a bank teller and you had outlined
20 your various positions in the banking industry.

21 How many years in total have you been in the
22 banking industry?

23 A. Well, it's been over 30 in total.

24 Q. Let's shift -- I want to talk about training. Turning
25 your attention to the time when you first joined M&I's Fraud

Haller - Direct
1 Detection Department, what sort of training did you receive
2 outside of the bank?

3 A. M&I participated with an information-sharing group, with
4 an organization called the American Bankers Association.

5 This consisted of a group of financial
6 institutions that would share fraud experience, fraud loss,
7 fraud information with each other through this committee.
8 We met quarterly and shared information among that group.

9 I would say that there were probably 20 to 25
10 financial institutions that participated in that group and
11 it was various sizes of financial institutions, from some of
12 the largest down to more regional banks, like M&I Bank.

13 I also participated in annual conferences with a
14 group called BAI that had an annual fraud conference and I
15 participated -- attended and also participated in that -- in
16 those conferences annually for several years.

17 Q. What was the purpose of you attending these sorts of
18 conferences?

19 A. Well, you know, it was really to have shared experiences
20 with other people that had similar roles to mine and
21 understand what they were doing, what their experiences were
22 related to fraud detection and to -- how to combat it.

23 For example, there were some large financial
24 institutions, nationwide financial institutions, such as
25 Bank of America, Citigroup, Wells Fargo, others of that

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1 national status, and they had a different perspective
2 because they had footprint across the country. Being a
3 regional bank and basically being in the Midwest, some of
4 the fraud trends would occur on the coast and then migrate
5 to the Midwest. So they had a view of --

6 MR. IHRIG: Objection, Your Honor, this is an
7 improper narrative.

8 THE COURT: Sustained.

9 BY MS. MOMOH:

10 Q. Mr. Haller, I will try to keep my directions -- my
11 questions and where I'm going tight. Okay?

12 A. Okay.

13 Q. So you generally explained the purpose of you attending
14 these conferences. Who typically attended these sorts of
15 conferences?

16 A. People that had positions similar to myself.

17 Q. Can you just name the categories of people who would
18 attend these sorts of conferences.

19 MR. IHRIG: Objection, relevance.

20 THE COURT: Sustained.

21 MS. MOMOH: Your Honor, if I may --

22 THE COURT: You may.

23 MS. MOMOH: -- approach?

24 **(At sidebar)**

25 MS. MOMOH: I'm going to be laying the foundation

Haller - Direct

1 if Your Honor would --

2 THE COURT: I can hear you.

3 MS. MOMOH: I have a loud voice, Your Honor.

4 THE COURT: I don't want --

5 MS. MOMOH: I know. I'm sorry. I have a loud
6 voice.

7 THE COURT: We can hear you.

8 MS. MOMOH: I know. I have a loud voice.

9 But I'm trying to lay the --

10 THE COURT: Lower your voice.

11 MS. MOMOH: Even my kids say that that's loud, so
12 I'll try my best.

13 I'm trying to lay the proper foundation with
14 respect to Mr. Haller's training in the fraud detection
15 industry because I'm going to be asking him questions with
16 respect to how M&I was perceived in the industry by its
17 peers.

18 He just mentioned a few banks. I want to -- I
19 want him to answer questions with respect to how M&I was
20 perceived in the industry with respect to its peers during
21 the 2002 to 2008 period with respect to its check monitoring
22 system and fraud detection system.

23 MR. IHRIG: Two things, Your Honor. That topic, I
24 believe, is irrelevant. M&I's peer banks' perception of M&I
25 does not have anything to do with this case. And, number

Haller - Direct

1 two, I don't believe that Mr. Haller could possibly have
2 foundation to testify about how another bank perceived M&I.

3 MS. MOMOH: And, Your Honor, if I may, I'm trying
4 to lay the foundation as to how he would be able to have
5 observed others with respect to their perception of the
6 bank.

7 And here's why it's relevant, Your Honor. Last
8 week, in the first few days of trial --

9 THE COURT: Your voice is loud.

10 MS. MOMOH: -- plaintiff showed several of the
11 bank's witnesses checks and the implications of what those
12 checks revealed. Tom Haller is the only witness that was on
13 either party's witness list that can address those
14 questions.

15 Given the accusations that have been made in this
16 case, it's only fair for us to also put forth evidence with
17 respect to how M&I Bank was perceived in the banking
18 industry during the relevant period of time with respect to
19 its fraud detection practices.

20 THE COURT: The objection is sustained. That is
21 beyond the scope and likely to confuse the jury as to the
22 matter.

23 MS. MOMOH: Yes. Before we go, I have a question.

24 THE COURT: Counsel?

25 MS. MOMOH: There were documents that were

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1 objected to earlier this morning in the 7:00 e-mail by
2 plaintiff's counsel, and the response that we received from
3 your clerk was that we were going to address those issues
4 live.

5 I also wanted to offer those documents into
6 evidence to get into the concept and the line of questions
7 with respect to what was the prevailing sort of fraud with
8 respect to checks that existed in the 2002 to 2008 period,
9 Your Honor.

10 Your Honor, if I may, I will connect the dots. I
11 will be brief on this. I understand you don't want me to go
12 into, you know, the details of conferences, but I do want to
13 go into the detail with respect to the -- what was
14 prevailing at the time with respect to check fraud detection
15 and what was being looked at and specifically what was not
16 being looked at during the 2002 and 2008 period.

17 And I do need a little bit of leeway, Your Honor,
18 to get to those questions. Otherwise, I'm going to be
19 getting foundation objections throughout.

20 MR. IHRIG: If I may just quickly, I believe what
21 counsel is describing is expert testimony. Defense will be
22 able to put on their experts to speak to custom and
23 practice. That is not what Mr. Haller is here to testify
24 to. He's not been -- he does not have specialized
25 expertise. He's not been approved as an expert in this

Haller - Direct

1 case. And I would submit that it would be improper for him
2 to even testify to those items.

3 MS. MOMOH: And, Your Honor, we're not putting him
4 forth as an expert. He is simply a factual witness. And
5 given his 30 years of experience in the banking industry, we
6 are simply trying to get him to testify based on what he
7 knows and what his observations are of others.

8 THE COURT: The objection is sustained.

9 **(In open court)**

10 BY MS. MOMOH:

11 Q. Mr. Haller, you testified previously as to conferences
12 that you attended during the 2002 to 2008 period. Was money
13 laundering discussed at these conferences?

14 A. No.

15 Q. Was the subject of Ponzi schemes ever discussed during
16 the 2002 to 2008 period at these conferences?

17 MR. IHRIG: Objection, relevance.

18 THE COURT: Sustained.

19 BY MS. MOMOH:

20 Q. Now, Mr. Haller, I may come back to certain topics, but
21 I want to focus on our discussion earlier with respect to
22 fraud detection not being a part of M&I's AML organizational
23 structure. Okay?

24 A. Okay.

25 Q. You testified that from an organizational chart

Haller - Direct

1 standpoint, that your role as vice president of the Fraud
2 Detection Group at M&I and BMO was in the Corporate Security
3 Group?

4 A. Yes.

5 Q. What was the purpose of the Corporate Security Group
6 during the 2002 to 2008 period?

7 MR. IHRIG: Objection, calls for speculation,
8 lacks foundation.

9 THE COURT: Overruled.

10 THE WITNESS: Well, there were three primary
11 focuses for the Corporate Security Group, one being fraud
12 detection, the other being physical security, and the third
13 being cyber security.

14 BY MS. MOMOH:

15 Q. Let's just focus on fraud detection. What was the focus
16 of the Fraud Detection Group specifically during the 2002 to
17 2008 period?

18 A. We were specifically tasked to identify fraudulent
19 activity as it related to check fraud, specifically checks
20 drawn on M&I accounts, checks deposited to M&I accounts, and
21 check kiting activity.

22 Q. What was the mandate -- if your group had a mandate,
23 what was the mandate of the Fraud Detection Group during the
24 2002 to 2008 period?

25 A. It was to identify counterfeit activity and maximize our

Haller - Direct

1 loss avoidance, minimize losses for the corp and its
2 customers.

3 Q. Was there any sort of overlap between the Corporate
4 Securities Group and the Bank Secrecy Act/AML Monitoring
5 Group during the 2002 to 2008 period?

6 MR. IHRIG: Objection, calls for speculation,
7 lacks foundation as to the AML Group.

8 THE COURT: Sustained.

9 BY MS. MOMOH:

10 Q. Mr. Haller, you testified that your role in 2002 to 2008
11 was in the Corporate Securities Group, yes?

12 A. Yes.

13 Q. But did you have any interaction with the AML Monitoring
14 Group during that period of time?

15 A. Not on a day-to-day basis.

16 Q. Not on a day-to-day basis, but did you have any
17 interaction with that group at all?

18 A. Yes.

19 Q. And how so?

20 A. I guess two things. One is that as a part of corporate
21 awareness I was -- I participated in monthly or bi-monthly
22 meetings with the AML Group. The other aspect is that
23 confirmed fraudulent activity would be escalated through the
24 Corporate Security Group for SAR filing.

25 Q. Focussing still on the Fraud Detection Group during the

Haller - Direct

1 relevant time period of 2002 to 2008, was money laundering
2 monitoring part of the work of that group during that time?

3 A. Part of which group?

4 Q. The Fraud Detection Group.

5 A. No, it was not.

6 Q. What about now, is money laundering a part of the Fraud
7 Detection Group?

8 MR. IHRIG: Objection, relevance.

9 THE COURT: Sustained.

10 BY MS. MOMOH:

11 Q. Focusing on the relevant period of 2002 to 2008, how
12 did -- based on what you just testified, how did the Fraud
13 Detection Group and the AML Monitoring Group interact?

14 A. Well, they did not on a regular basis, but there were
15 Suspicious Activity Reports that needed to be filed. We
16 would submit our information to the Corporate Security Team
17 and they would meet with the AML Group for SAR filing.

18 Q. Again, we're still talking about the 2002 to 2008
19 period. Did you or anyone in your Fraud Detection Group use
20 the word quote, unquote, alert in your --

21 MR. IHRIG: Objection. Sorry.

22 MS. MOMOH: Your Honor, if I may finish my
23 question?

24 THE COURT: You may finish your question.

25 MS. MOMOH: Thank you.

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1 BY MS. MOMOH:

2 Q. I'm going to restart, Mr. Haller. Again, we're talking
3 about the 2002 to 2008 period. Did you or anyone in your
4 group ever use the word quote, unquote, alert in your fraud
5 detection practice?

6 MR. IHRIG: Objection, calls for speculation as to
7 other people in the witness's group.

8 THE COURT: Sustained.

9 BY MS. MOMOH:

10 Q. Just focusing on you, during the period of time 2002 to
11 2008, did you ever use the word "alert" in your fraud
12 detection practice?

13 A. Our standard word was a suspect.

14 Q. Why would you use the word "suspect"?

15 A. Well, it was a part of the naming convention with the
16 reports that we used related to the fraud detection tools
17 and it was not confirmed fraud, but it was a suspect at that
18 point.

19 Q. You were -- so you were talking about your role as vice
20 president of fraud detection during this relevant period.

21 Thinking about the wire side now, who would have
22 been your counterpart on the wire side?

23 A. There's a gentleman by the name of Ray Neufeldt that ran
24 the wire department for M&I.

25 Q. Please tell the jurors. Who is Ray Neufeldt?

Haller - Direct

1 A. Ray Neufeldt is -- was an M&I employee and he ran the
2 wire department.

3 Q. In which instances would you interact with Mr. Neufeldt?

4 A. It was not often that I interacted with Mr. Neufeldt,
5 but there might be times related to online fraud where we
6 would interact.

7 Q. During the 2002 to 2008 period what would happen if
8 fraud activity was detected in a customer's account at M&I?

9 A. Well, the first thing would be to mitigate the exposure
10 to the account and return any transactions that were
11 eligible for return. Then there would be the standard
12 reporting. And we would look to put a long-term solution in
13 place for the customer and their accounts.

14 Q. Would be the example of mitigating the exposure to the
15 account?

16 A. We could put protective status on the account. If it
17 was a check that -- a counterfeit check that posted to the
18 customer's account, we would return that check back to the
19 bank of first deposit and credit the customer's account for
20 the debit for that counterfeit activity.

21 Q. Are you familiar with what would have been called the
22 Exceptions Department at M&I?

23 A. Yes.

24 Q. What is the Exceptions Department?

25 A. The Exceptions Department is a back office group that

handles -- "day two" is a typical word for that -- back office transaction activity for a bank.

Q. Was the Fraud Detection Department in the Exceptions Department?

A. No. We were separate.

Q. What did the Fraud Detection Department do that the Exceptions Department did not do in this relevant period that we've been talking about?

A. Well, the Fraud Detection Department was specifically tasked with identifying counterfeit activity. The Exceptions Department did more standard day two activity, standard payment processing activity for the bank.

Q. You're saying day two processes. What do you mean?

A. So there is a transaction posting process to customer accounts, and then there is activity that would happen after posting.

For example, if a check posted to a customer's account and there was a stop payment on that check, it would post to the customer's account on day one and it would be returned via the stop pay process the following day.

Q. Did either department have in their purview specific procedures for large dollar checks?

A. Yes.

Q. What would be a large dollar designation?

A. M&I had that at \$50,000.

~~Haller - Direct~~

1 Q. What would be the process for the Exceptions Department
2 to review a large dollar check?

3 A. They would look to see if the item was properly payable,
4 meaning that there was a payee named, that there was a
5 customer signature on the check, that the check beared an
6 endorsement. Those were the attributes of a large dollar
7 check. And then also that there were funds in the account
8 to pay for that item.

9 Q. Same period of time we've been talking about, 2002 to
10 2008. What were your observations of the bank's support of
11 risk management? To be clear, I'm not asking you what did
12 management at M&I say during this time with respect to risk
13 management, but I'm asking you about your view from the top.
14 What were your observations of managers with respect to risk
15 management?

16 A. With my activity --

17 MR. IHRIG: Objection, relevance.

18 THE COURT: Overruled.

19 THE WITNESS: Okay. From my involvement, my
20 superiors were very supportive of the activities that we
21 did. Not only were they spending money on people and
22 software and processes, but there was an attitude throughout
23 the bank that we were totally against fraud. We were very
24 aggressive against it when -- and took a firm stance. We
25 wanted to identify small frauds, not just big ones, because

Haller - Direct

1 small frauds --

2 MR. IHRIG: I'm sorry, Your Honor. Objection,
3 this is an improper narrative.

4 THE COURT: Sustained.

5 BY MS. MOMOH:

6 Q. Mr. Haller, with respect to my question about your
7 observations of managers, just so that we can have it clear
8 for the record because I'm not quite sure with respect to
9 the objection, succinctly, briefly, what were your
10 observations of managers with respect to risk management?

11 A. They were very supportive of our efforts.

12 Q. How did you try to share those observations that you
13 just shared with us with the employees that you supervised
14 when you were the vice president of fraud detection?

15 A. I'm sorry. I don't know that I understand the question.

16 Q. Sure. So you just shared your observations of
17 management at M&I with respect to risk management. What I'm
18 asking you is: How did you share your observations with
19 those that you supervised and managed during the period of
20 2002 to 2008?

21 A. Well, I carried that message of support to my employees,
22 knowing that they had the backing and the support of
23 executive management.

24 There were policies and procedures that were
25 active that were very supportive to my team, as well as the

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1 financial expenditures that were being made in order to
2 support the activities that my team did.

3 Q. Were you ever asked to not escalate a check for further
4 review at any time?

5 A. Never.

6 Q. Did analysts in the Fraud Detection Group ever give my
7 sort of special treatment to accounts or customers based on
8 the customer's perceived status in the bank?

9 MR. IHRIG: Objection, calls for speculation,
10 lacks foundation.

11 THE COURT: Sustained.

12 BY MS. MOMOH:

13 Q. Mr. Haller, did you ever give any sort of special
14 treatment to accounts or customers based on the customer's
15 perceived status in the bank?

16 A. No.

17 MR. IHRIG: Objection, relevance.

18 THE COURT: Overruled.

19 THE WITNESS: No, I did not.

20 BY MS. MOMOH:

21 Q. Same question, but this time with respect to special
22 treatment based on a customer's perceived public profile or
23 celebrity status in the community. Did you ever give
24 special treatment to accounts or customers under those
25 circumstances?

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1 A. I did not.

2 Q. How did M&I try to ensure that a fresh set of eyes of
3 those on your team were looking at customer accounts with
4 the bank?

5 MR. IHRIG: Objection, calls for speculation to
6 the extent it asks for testimony from M&I's point of view.

7 THE COURT: Sustained.

8 BY MS. MOMOH:

9 Q. Mr. Haller, if you know, how did M&I try to ensure that
10 employees in the Fraud Detection Group had fresh eyes on the
11 accounts they were reviewing?

12 MR. IHRIG: Same objection, calls for speculation.

13 THE COURT: Sustained.

14 BY MS. MOMOH:

15 Q. Mr. Haller, do you know if M&I tried to ensure that
16 there were fresh eyes from your employees looking at
17 accounts at the bank?

18 MR. IHRIG: Same objection, calls for speculation.

19 THE COURT: Sustained.

20 BY MS. MOMOH:

21 Q. Mr. Haller, what sort of suspicious activity is
22 implicated by check fraud?

23 A. The number one activity is counterfeit activity.

24 Q. By "counterfeit," what do you mean?

25 A. This is a wholly manufactured document not authorized by

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1 the accountholder and presented for payment. That was the
2 most significant of all the activity.

3 Other fraud types are altered items, where a
4 legitimate check is written by a customer but either the
5 payee or the amount of the check is changed. So the check
6 may be payable to Tom Haller, and I get it and I change it
7 to Mickey Mouse and try to collect on that check; or the
8 check was written for \$100, but I change it to \$1,000 and
9 present that check for payment.

10 Altered and counterfeit --

11 MR. IHRIG: I'm sorry, Your Honor. This is
12 another improper narrative.

13 THE COURT: Overruled.

14 BY MS. MOMOH:

15 Q. You may complete your answer, Mr. Haller.

16 A. Altered and counterfeit were the two large transaction
17 types of fraud.

18 Q. Did the focus on counterfeit change after September 11?

19 A. Yes, it did.

20 Q. And -- but before you explain how, just so we're all on
21 the same page, what happened on September 11?

22 A. It was the Twin Tower attacks.

23 Q. How, then, did the focus change from counterfeit to
24 something else after September 11?

25 A. One of the things that happened after September 11th was

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1 that all planes were grounded. Checks -- physical checks
2 had to travel from one place to another in order be paid,
3 and as a result those checks sat. They did not move from
4 one to another.

5 This created a risk to financial institutions
6 across the country, where items were taken in on deposit but
7 they could not be collected. So we didn't know if those
8 checks were good or not. This was a systemic risk to the
9 banking system.

10 And there were two initiatives really that came
11 out of that. One was image -- check image processing. So
12 you could take a picture of the check and send that for
13 payment as opposed to the physical document, and you could
14 send the picture electronically. The other thing was an
15 expanded focus on online banking, so banking via the
16 internet for qualified customers.

17 Q. Why did that become a focus -- let me back up. You said
18 that there was a shift in focus also to online banking.
19 When was that shift to online banking?

20 A. Well, I think that it was --

21 MR. IHRIG: Objection, relevance.

22 THE COURT: Sustained.

23 MS. MOMOH: Your Honor, if I may?

24 THE COURT: You may come to sidebar.

25 MS. MOMOH: Thank you.

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1 **(At sidebar)**

2 THE COURT: Relevance?

3 MS. MOMOH: I think they're proving my point with
4 respect to their objections here. With respect to the PCI
5 account, there was no --

6 THE COURT: Speak closer to me.

7 MS. MOMOH: There was no issue with respect to
8 online banking. There was no issue with respect to
9 counterfeit. And that's what the bank was focused on at
10 that time, as were other peers.

11 I'm trying to make the connection, Your Honor, if
12 you would allow me to do so, that, again, Ponzi schemes, not
13 only were they not only a focus with respect to AML during
14 the relevant period of 2004 to 2008, it wasn't even a focus
15 with respect to the check fraud industry during the 2002 to
16 2008 period.

17 MR. IHRIG: Your Honor, if I might, this is all
18 irrelevant. We are hearing about September 11th now and
19 systemic risks to the banking industry, and I don't see how
20 this even approaches anything that's relevant to this case.

21 MS. MOMOH: Your Honor, one of our key themes in
22 this case is hindsight bias. And it's important for the
23 jurors to understand that there have been changes and
24 evolutions within the banking industry, not only with
25 respect to AML and money laundering, but also with respect

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1 to the check industry.

2 Again, plaintiff showed several of the AML
3 witnesses checks that they were not in their purview to
4 review as far as Searchspace. Now we have an actual witness
5 that can respond to questions with respect to how the bank
6 reviewed and treated checks as part of its check fraud
7 monitoring system.

8 MR. IHRIG: Your Honor, plaintiffs show checks to
9 people with percipient knowledge. At the time these events
10 occurred, Mr. Haller has already testified that he had no
11 interaction with this account during the relevant period of
12 time.

13 MS. MOMOH: Your Honor, he has not -- for purposes
14 of trial, he has not testified to that whatsoever with
15 respect to any of my questions. I'm not sure what Mr. Ihrig
16 is referring to.

17 THE COURT: I don't see the relevance of this line
18 of questioning and I think it's likely to confuse the jury
19 and to waste time.

20 MS. MOMOH: Your Honor, I -- again, he is the only
21 check witness that either side has called in this case. I
22 ask for leeway, Your Honor, to ask my questions. You will
23 see the connection that I am making.

24 THE COURT: I need to see the connection in the
25 next question because I am evaluating the questions you're

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1 asking, and they show no relevance.

2 MS. MOMOH: Understood, Your Honor. Thank you.

3 THE COURT: The objection is sustained.

4 MS. MOMOH: But you said I can continue to ask my
5 questions, though?

6 THE COURT: Yes, one question. The next question
7 needs to be relevant.

8 **(In open court)**

9 BY MS. MOMOH:

10 Q. Mr. Haller, I want to talk about the Carraker fraud
11 system that you had mentioned as one of the -- the software
12 that you helped to implement at M&I. Okay?

13 A. Yes.

14 Q. My understanding is that the Carraker fraud system has
15 three components?

16 A. There were three, yes, software, yes.

17 Q. What are those three components of the Carraker fraud
18 system?

19 A. Are you talking about the applications that we installed
20 or the On-Us fraud system specifically?

21 Q. Let's start with the former part that you had just
22 mentioned.

23 A. Okay. So there were --

24 Q. And, Mr. Haller, at this point I'm just asking you to
25 identify the three different Carraker fraud systems that

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1 were in place in 2002 to 2008.

2 A. It was Carraker --

3 THE COURT: Is this specific to the bank?

4 MS. MOMOH: This is specific to the bank, M&I,
5 yes, Your Honor.

6 THE WITNESS: It was Carraker On-Us, Carraker
7 Deposit, and Carraker Kite.

8 BY MS. MOMOH:

9 Q. I want to just focus on the On-Us fraud system with
10 respect to Carraker. From when to when has the bank,
11 whether M&I or now BMO, used the On-Us fraud system?

12 MR. IHRIG: Objection, relevance as to any time
13 after 2008.

14 THE COURT: Sustained.

15 MS. MOMOH: Your Honor, if I may ask -- if I may
16 briefly, I'm simply asking him for a timestamp with respect
17 to when the fraud system has been used and I think it would
18 be relevant, if it's still presently used, for him to state
19 that; and if not, he can tell me a year that it ended in
20 use.

21 THE COURT: Sustained.

22 BY MS. MOMOH:

23 Q. Mr. Haller, when did M&I start using the On-Us fraud
24 system?

25 A. I believe it was 2002.

1 Q. Is M&I -- is BMO still using the same system?

2 MR. IHRIG: Objection, relevance.

3 THE COURT: Sustained.

4 BY MS. MOMOH:

5 Q. Mr. Haller, during the two thousand -- I believe you
6 said 1999 is when the bank started using --

7 MR. IHRIG: Objection, misstates the testimony.

8 BY MS. MOMOH:

9 Q. I'm sorry. Let me back up. I believe you said it was
10 2002, correct?

11 A. Yes.

12 Q. Okay. So from 2002 -- just focusing on the relevant
13 period of time at least. So at least during the relevant
14 period of 2002 to 2008, was M&I using the On-Us Carraker
15 fraud system?

16 A. Yes.

17 Q. What is the On-Us fraud system?

18 A. It is a software tool designed to identify anomalies in
19 M&I bank accounts related to check activity.

20 Q. For purposes of the On-Us Carraker fraud system, what
21 question would M&I have been trying to answer during the
22 2002 to 2008 period?

23 MR. IHRIG: Objection, calls for speculation,
24 lacks foundation as to M&I's point of view.

25 THE COURT: Overruled. You may answer if you

1 know.

2 THE WITNESS: The objective was to identify
3 unauthorized activity and eliminate that risk from
4 counterfeit activity.

5 BY MS. MOMOH:

6 Q. What do you mean by "unauthorized activity"?

7 A. Meaning that we were looking to identify checks that
8 were not authorized by the customer, that the customer did
9 not write.

10 Q. With that understanding for purposes of the On-Us
11 Carraker fraud system, what is check fraud?

12 A. Check fraud is activity not authorized by the customer.

13 Q. What are some examples of activity that would not be
14 authorized by the customer of the bank?

15 A. Well, any check that posts to a customer's account that
16 they didn't write, a wholly manufactured counterfeit check
17 that was created by a third party and presented for payment.

18 Q. What components make up the On-Us fraud system?

19 A. There are three components to make this work.

20 The first one is account history. There's 90 days
21 of check history in the filter. This is important because
22 it allows the system to normalize at the account level.

23 The second are the rules --

24 Q. So what -- so let's break it down.

25 A. All right.

1 Q. So you identified the first filter, which is history?

2 A. Yes.

3 Q. What's the second filter?

4 A. The parameter settings.

5 Q. What are the parameter filters?

6 A. So these are the rules that would be used to help guide
7 the system to determine out-of-tolerance transactions.

8 Q. What are out-of-tolerance transactions?

9 A. Something out of norm for the account --

10 Q. What --

11 A. -- something that was unusual for the 90-day account
12 history.

13 Q. Please provide examples. What would be, again, out of
14 tolerance?

15 A. Okay. So it could be the number of checks that have
16 posted. It could be the dollar amount of the check that is
17 posted. It could be the serial number of a check that
18 posted. Where the active range is, let's say, in the 1000
19 range and a check posts that has a serial number of 5000,
20 that would be out of tolerance for typical activity in the
21 account.

22 Q. Those are examples of parameters?

23 A. Yes.

24 Q. What's the third filter in the On-Us fraud system?

25 A. The third component is today's transactions, the checks

1 that posted to the customer's account today.

2 Q. How do these filters operate with each other, if at all?

3 A. So today's transactions are added to the software and
4 the software analyzes them compared to historical activity
5 through the lens of the parameter settings within the
6 system.

7 Q. What is the On-Us Flag Report?

8 A. It's the On-Us Suspect Report.

9 Q. What is that?

10 A. That is a list of the items that were identified by the
11 software as being out of tolerance with historical activity
12 for the account.

13 Q. How frequently were the On-Us Suspect Reports generated?

14 A. They were generated daily.

15 Q. How many analysts were assigned to review the On-Us
16 Suspect Reports?

17 A. I don't know exactly, but approximately a dozen or so.

18 Q. During the 2002 to 2008 period, why was this level of
19 review being done on checks?

20 A. Check fraud was increasing dramatically during that time
21 frame. There were many scams that were being operated and
22 the numbers of counterfeit checks was growing across the
23 country.

24 Q. Once a check is reviewed, what sort of decision would an
25 analyst make with respect to whether -- given the various

1 filters that are applied, how the check would be treated?

2 A. If I understand your question correctly, an item on the
3 suspect report would be reviewed.

4 There would be information that would be provided
5 by the software, the reason why this item is identified for
6 review; some account history information, such as the
7 account number, the name, other historical information about
8 the account.

9 The analysts would look at the physical document,
10 looking at the color, the maker information, all of the
11 physical attributes of a check and compare that item to
12 historical items that have paid against the account.

13 Should they deem this of concern, they could raise
14 that to their supervisor and/or escalate to the account
15 officer to have them weigh in, including escalation to the
16 customer for that pay/no pay decision.

17 Q. So that was my question. The decision after a check is
18 reviewed could be one or the other. What are the two
19 options with respect to a decision that could be made on a
20 check after it's reviewed?

21 A. Either it would stay as a paid item or it would be
22 returned.

23 Q. You testified that as part of the review that maker
24 information was considered. Did you mean to say "maker
25 information"?

1 A. Maker.

2 Q. What's that?

3 A. That's the customer information, the accountholder
4 information.

5 Q. During the 2002 to 2008 period, what, if anything, would
6 have led to the parameters evolving?

7 MR. IHRIG: Objection, calls for speculation.

8 THE COURT: Overruled. You may answer if you can.

9 THE WITNESS: Check fraud evolved over time. We
10 would learn through our own experience and that of -- with
11 other peer financial institutions about trends that they
12 were seeing and -- as well as losses that we may have
13 sustained, meaning a check that we had missed and didn't
14 properly identify as a counterfeit check.

15 This transaction activity would change over time,
16 and we would address the fraud parameters in order to better
17 address the fraudulent activity that we were seeing.

18 BY MS. MOMOH:

19 Q. What would happen if under the On-Us fraud system a
20 check was deemed a suspect?

21 A. That item would show up on the report and an analyst
22 would review that document. That check would be reviewed
23 for the physical nature of the check as well as account
24 history and make an evaluation to whether they had any
25 concerns or that they could remedy any discrepancy that was

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1 identified by the fraud filter.

2 Q. So even if a check was identified as a suspect, the
3 decision could still be to pay?

4 A. The vast majority of the decisions that were made
5 with -- in regard to the On-Us system was to pay.

6 Q. What if a check was not escalated for further review, in
7 other words, it wasn't deemed to be a suspect, would that
8 check get to the AML Monitoring Group for review?

9 MR. IHRIG: Objection, calls for speculation,
10 lacks foundation.

11 THE COURT: Sustained.

12 BY MS. MOMOH:

13 Q. Mr. Haller, do you know what would happen if -- just in
14 the absence of a particular check, just generally as a
15 matter of process, do you know what would happen if a check
16 was not escalated for further review because it wasn't
17 deemed a suspect?

18 MR. IHRIG: Objection, improper hypothetical,
19 improper opinion testimony, relevance.

20 THE COURT: Overruled.

21 THE WITNESS: That item would be paid.

22 BY MS. MOMOH:

23 Q. Was the Carraker system intended to uncover a Ponzi
24 scheme?

25 A. It was not.

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1 MR. IHRIG: Objection, lacks foundation, calls for
2 speculation.

3 THE COURT: Sustained.

4 BY MS. MOMOH:

5 Q. Mr. Haller, you testified that you implemented the
6 Carraker system at M&I around 2002, correct?

7 A. Yes.

8 Q. When you implemented the Carraker system at M&I, was it
9 for purposes of uncovering a Ponzi scheme?

10 A. It was not.

11 Q. Throughout your time in the Fraud Detection Group until
12 2008, was that ever the purpose of the Carraker system, to
13 uncover a Ponzi scheme?

14 A. It was not.

15 Q. Mr. Haller, I want to apply some of the principles that
16 we've just been talking about.

17 Let's start with parameters. We talked about the
18 On-Us filters generally and the parameters specifically.

19 What are round number amounts on a check?

20 A. A round dollar amount is typically where an item ends in
21 zeros, dollars and cents.

22 Q. Would that constitute a parameter?

23 A. There was not a parameter for round dollar checks in the
24 On-Us system.

25 Q. So if a check had round dollar amounts, would that

1 constitute a check that would need to be escalated for
2 further review?

3 MR. IHRIG: Objection, calls for speculation.

4 THE COURT: Overruled.

5 THE WITNESS: It would not.

6 BY MS. MOMOH:

7 Q. On its own would a round number check be suspicious?

8 A. It would not.

9 Q. What is an example of a duplicate check?

10 A. A duplicate check number would be where a customer has
11 presented two items on the same account with the same check
12 number.

13 Q. Using that example, what would be the decision -- the
14 disposition of that sort of check?

15 A. If there was no information available, that item would
16 be generally escalated to the account officer and
17 potentially to the customer to ask them whether they
18 authorized this particular document.

19 Q. And if the customer authorized that check?

20 A. That item would be paid.

21 Q. Let's talk about memo lines on a check. What's the
22 purpose of a memo line on a check?

23 A. Well, it could be many things. It's basically a note
24 from the maker of the check relative to purpose.

25 Q. How, if at all -- I'll try to ask my question very

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1 carefully. Okay?

2 A. Okay.

3 Q. So how, if at all, would a memo line on a check be
4 considered for purposes of the On-Us fraud system?

5 A. It would not be part of the consideration to be a -- to
6 be flagged as a suspect.

7 Q. Why do you say that?

8 A. Because there was no interrogation of the writing
9 associated with the check. The Carraker system used the
10 transaction information based on what's called the MICR
11 line, which is the funny numbers that you see on the bottom
12 of checks. It has the routing number, the account number,
13 the check number, and the dollar amount.

14 Q. If the memo line on a check is blank, would that check
15 be deemed a suspect?

16 A. No.

17 Q. Would the check need to be escalated for further review
18 simply because the memo line was blank?

19 A. No. It's most often blank.

20 Q. What if the check had in the memo line "Disney on Ice
21 tickets," would that check be a suspect?

22 MR. IHRIG: Objection, calls for speculation.

23 THE COURT: Overruled.

24 THE WITNESS: On its own, no.

25 BY MS. MOMOH:

1 Q. What if a check had on the memo line that the purpose of
2 the check was to build a home, would that check be a
3 suspect?

4 A. No.

5 Q. What if the check had on the memo line it was for a
6 loan, would that check be a suspect?

7 A. No.

8 Q. Are you familiar with the concept of dual signatures on
9 a check?

10 A. Yes.

11 Q. Explain to the jurors, please, what dual signatures on a
12 check means.

13 A. Dual signature is a customer initiative whereby there
14 would be a dual control at the company for payments that
15 were being created, for example, like a check and balance
16 for the payments. And it would typically be for larger
17 dollar payments. So it would be one person writes the check
18 and a second person signs off on the check, so to speak,
19 prior to sending the check to the intended payee.

20 Q. This concept that we've been talking about, dual
21 signatures, was this a service that was offered by M&I
22 during the period of 2002 to 2008?

23 A. No, it was not really a service that was provided. That
24 was a customer-initiated protocol that they would use.

25 Q. Would you call that a control set by the customer, then?

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1 A. Yes.

2 Q. What can you tell me about this control?

3 A. So, again, it would be a process where it wouldn't just
4 be the one person that wrote the check, but a second person
5 would review the payment, make sure the payment was correct,
6 that the amount was correct. And that process would happen
7 prior to sending that check to the intended recipient.

8 Q. Let's say we have a check and there's two lines for a
9 signature. There's only one signature on the check. Would
10 the fact that there's only one signature on the check make
11 that check unpayable from the bank's perspective?

12 A. It would not.

13 Q. Why do you say that?

14 A. The one signature is an authorized signature that would
15 make the item payable.

16 Q. Is it a requirement -- well, just focus on the 2002 to
17 2008 period. Was it a requirement of M&I to pay an item
18 only if the check had two signatures?

19 A. No.

20 MS. MOMOH: Mr. Herzka, if you can put up what's
21 been admitted as Plaintiff's Exhibit P-33.

22 BY MS. MOMOH:

23 Q. Mr. Haller, you can look in your binder there. You'll
24 see a tab that says P-33. If you don't mind turning to that
25 document, please, and reviewing it before I ask you some

1 questions about it.

2 A. This is quite a binder.

3 Q. What is it that you're looking at?

4 A. It appears to be a National City Bank signature card.

5 Q. What's the account number that you see at the top?

6 MS. MOMOH: Mr. Herzka, if you could highlight
7 that, please.

8 THE WITNESS: [REDACTED] 9018.

9 BY MS. MOMOH:

10 Q. Who's the customer associated with this account?

11 A. Petters Company.

12 Q. What's the address that you see on this document?

13 A. 7585 Equitable Drive, Eden Prairie, Minnesota 55344.

14 Q. If I were to represent to you that what we are looking
15 at here is the signature card for the PCI account at M&I
16 that began initially at National City Bank, would you have
17 any reason to disagree with me?

18 A. No.

19 Q. Do you see where it says, "Number of Signatures
20 Required: 2 ON CHECKS OVER \$5,000"?

21 A. Yes.

22 Q. And, Mr. Herzka [sic], I will direct your attention to
23 the screen as well because I know the document is difficult
24 to read.

25 Mr. Haller, if you turn your attention to the

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1 monitor in front of you, you see that the language is blown
2 out for you there --

3 A. Yes.

4 Q. -- for you to see, correct?

5 A. Yes.

6 Q. Where it says, "Number of Signatures Required: 2 ON
7 CHECKS OVER \$5,000," is that the dual signature that we've
8 been talking about generally?

9 A. Yes, I assume so.

10 Q. Who are the two signatures that are -- who are the two
11 authorized signers for the PCI account?

12 A. Thomas Petters and Deanna Munson.

13 MS. MOMOH: Mr. Herzka, if you can put up
14 Plaintiff's Exhibit 53 [sic] at page 9 and page 76 side by
15 side, please. Mr. Herzka, Exhibit 57, please, page 9 and
16 76, please, side by side. Do you mind calling out,
17 Mr. Herzka, the two checks.

18 BY MS. MOMOH:

19 Q. Mr. Haller, I'm showing you for illustration purposes --
20 to put what you've already told us in context, I'm showing
21 you two pages from Exhibit P-57. This is Plaintiff's
22 Exhibit.

23 Looking at the first check that's on page 9, who's
24 the payor?

25 A. Petters Company -- Petters Company, Inc.

1 Q. Petters Company, Inc., PCI. And that's the same payor
2 that you see on the second check at page 76?

3 A. The one on the right?

4 Q. Correct.

5 A. Yes.

6 MS. MOMOH: Mr. Herzka, if you don't mind
7 highlighting the information as yellow as we proceed.

8 BY MS. MOMOH:

9 Q. Who's the payee on both checks?

10 A. Deanna L. Munson. Deanna Munson on the other.

11 Q. Do you see the account number for these two checks that
12 we're looking at on Plaintiff's Exhibit 57?

13 A. Yes.

14 Q. What are the account numbers?

15 A. [REDACTED] 9018.

16 Q. They're the same?

17 A. Yes.

18 Q. Let's look at the signatures. Let's look at the one on
19 the left at page 9. How many signatures do you see there?

20 A. One.

21 Q. Whose signature is that?

22 A. Deanna Munson.

23 Q. Let's look at the second check on page 76. How many
24 signatures do we see?

25 A. Two.

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1 Q. What could explain why we're seeing two signatures on a
2 check on the one on the right, page 76, compared to only one
3 signature on the left on page 9 of Plaintiff's Exhibit 57?

4 MR. IHRIG: Objection, calls for speculation.

5 THE COURT: Overruled.

6 THE WITNESS: It appears as though there's two
7 different check stocks that are being used for this
8 particular account.

9 BY MS. MOMOH:

10 Q. How do you know that?

11 A. Well, one of them has one line for the signature. The
12 other has two lines for the signature.

13 Also, there's M&I -- or, I'm sorry, M&I Marshall &
14 Ilsley Bank check on the right below the payee, and that is
15 not the same -- in the same location as the one that is on
16 the left.

17 There also appears to be two different addresses
18 that are being used by Petters Company in the maker block in
19 that upper left that's being highlighted right now.

20 Q. Now, you mentioned that, looking at these two checks,
21 that it appears that they were on different check stock.
22 What's the significance of that?

23 A. Well, that the customer is using two different active
24 check stocks on this particular account, at least two.

25 Q. Again, just for illustration purposes, we're talking

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1 about this concept of dual signatures. Comparing these two
2 checks, especially the one on the left where there's only
3 one signature, based on what you see and based on the
4 signature card that you saw, what would have been the
5 disposition of that check, in other words, what would have
6 been the decision with respect to payment on that check?

7 MR. IHRIG: Objection, lacks foundation, calls for
8 speculation.

9 THE COURT: Sustained.

10 BY MS. MOMOH:

11 Q. Mr. Haller, just for illustration purposes, then, we've
12 been talking about generalities with respect to the
13 signature cards and whether a customer has asked for a
14 control that there be two signatures put on a check.

15 Looking at what we have here on the left, if there
16 was that check with just that one signature, when you saw
17 the signature card that said that there were two signatures,
18 what would be the decision on that check with respect to
19 payment?

20 MR. IHRIG: Objection, lacks foundation, calls for
21 speculation, relevance, compound, assumes facts not in
22 evidence.

23 MS. MOMOH: Your Honor, I'm just asking for
24 illustration purposes.

25 THE COURT: Relevance. Sustained.

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1 BY MS. MOMOH:

2 Q. Mr. Haller, you mentioned that there were two different
3 addresses on these two checks.

4 A. Yes.

5 MS. MOMOH: Mr. Herzka, if you could call out both
6 of those, please, and if you can make them larger, the
7 addresses, please.

8 BY MS. MOMOH:

9 Q. What are the two addresses that you see here?

10 A. The one on the top I believe says, "7586 Equitable
11 Drive, Eden Prairie, Minnesota, 55344."

12 Q. The same address that was on the signature card that we
13 looked at at Exhibit P-33?

14 A. I believe that's correct.

15 Q. What is the address that you see on the second check?

16 A. 4400 Baker Road, Minnetonka, Minnesota, 55343-8684.

17 Q. Mr. Haller, have you observed instances where a customer
18 has written checks from the same account during the same
19 period but the two checks bear different addresses?

20 MR. IHRIG: Objection, relevance, calls for
21 speculation.

22 THE COURT: Overruled. You may answer if you can.

23 THE WITNESS: Sure, it's very common.

24 BY MS. MOMOH:

25 Q. What were the circumstances?

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1 A. So it could be that there were two different offices
2 associated with the same company, two different locations.
3 Each office may have their own series of checks that they
4 would use in the normal course of their business.

5 Q. Again, the fact that the two checks have different
6 addresses for the same customer, would that make either
7 check a suspect?

8 A. No.

9 MS. MOMOH: Mr. Herzka, you can take those down,
10 please.

11 BY MS. MOMOH:

12 Q. Mr. Haller, do you know what a general business
13 operating account is?

14 A. Yes.

15 Q. Do you know what a trust account is?

16 A. Yes.

17 Q. What is a general business operating account?

18 A. An operating account for a business would be an account
19 used to pay and receive funds associated with the going
20 concern of the business.

21 Q. What's a trust account?

22 A. A trust --

23 MR. IHRIG: Objection, foundation, relevance.

24 THE COURT: Overruled.

25 THE WITNESS: A trust account is an account that

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1 has been set up for a specific purpose generally involving a
2 third party.

3 BY MS. MOMOH:

4 Q. What's the different between the two?

5 A. Well, a general operating account would be one that
6 would be used, again, for any purpose that the business
7 deemed as appropriate for that business account.

8 A trust account is one that is set up specifically
9 for an individual for a specific purpose, whatever that
10 purpose might be.

11 Q. If I were to tell you that PCI had a general business
12 operating account at M&I during the relevant period of 2002
13 to 2008, would you have any reason to disagree with me?

14 A. No, I do not.

15 MR. IHRIG: Objection, assumes facts in
16 evidence -- not in evidence, excuse me.

17 THE COURT: I didn't hear you.

18 MR. IHRIG: Objection, assumes facts not in
19 evidence.

20 THE COURT: Sustained.

21 BY MS. MOMOH:

22 Q. Would the fact that a check for -- let's say that the
23 check had a memo line and the memo line said, "Bonus."
24 Would the fact that a check for a bonus was being written
25 out of an account during the 2002 to 2008 period be a

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1 suspect?

2 MR. IHRIG: Objection, assumes facts not in
3 evidence.

4 THE COURT: Sustained.

5 MS. MOMOH: Your Honor, I'm just asking about a
6 general check in this point. I'm not talking about the PCI
7 account. I'm just talking generally, as I had before, with
8 respect to checks and the decision to pay or to not pay
9 based on a limited set of facts that I'm sharing with
10 Mr. Haller.

11 MR. IHRIG: Objection, relevance.

12 THE COURT: Sustained.

13 BY MS. MOMOH:

14 Q. Mr. Haller, what about checks where the payee on the
15 check is not a person, it just simply says, "Cash," what
16 does that mean?

17 MR. IHRIG: Objection, assumes facts not in
18 evidence and vague.

19 THE COURT: Sustained.

20 MS. MOMOH: Your Honor, if I may approach for a
21 sidebar, please?

22 THE COURT: You may.

23 The jury may feel free to stretch and stand.

24 **(At sidebar)**

25 MS. MOMOH: If I understand the objection, it was

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1 assumes facts not --

2 THE COURT: Please lower your voice.

3 MS. MOMOH: The objection was assumes facts not in
4 evidence and vague. My question was simply what about
5 checks where the payee on the check is not a person. So I'm
6 not referring to anything specifically with PCI. I am doing
7 what I had done before, asking general questions about
8 checks, facts that may apply to those checks, and how the
9 Carraker filter would be used, essentially.

10 MR. IHRIG: The facts that are not in evidence are
11 the hypothetical facts that the witness is being questioned
12 about. It's completely irrelevant. It appears to be
13 nothing more than dragging this out.

14 MS. MOMOH: Your Honor, if I may? I'm also -- for
15 the record, I'm concerned and do not understand the
16 objection with respect to assumes facts not evidence with
17 respect to the specific questions I'm asking.

18 Here I'm asking a general question, but even in
19 this very case, I am showing Mr. Haller Exhibit P-33, their
20 very own exhibit, which is over 100 pages, where you see
21 several checks from the PCI account that was with M&I where
22 the payee is identified as cash. I've also shown --
23 Mr. Haller can see there are various checks as well where
24 the memo line said, "Bonus."

25 So for them to suggest that it assumes facts not

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1 in evidence, this is evidence that they themselves offered
2 and that was received.

3 THE COURT: What's the relevance of this and why
4 is this witness testifying about it?

5 MS. MOMOH: Your Honor, we're simply putting on
6 our case-in-chief and --

7 THE COURT: I'm asking about relevance.

8 MS. MOMOH: The relevance, Your Honor, is to show
9 that the decisions that M&I made with respect to the various
10 PCI checks was all consistent with the fraud detection
11 system that was in place in 2002 and 2008. The decision to
12 pay was proper. That's what I'm trying to lay the
13 foundation for and certainly ask the questions of for this
14 case.

15 MR. IHRIG: Your Honor, I would submit that the --
16 to elicit relevant testimony on that, it would require
17 presenting the checks to somebody who actually saw those
18 checks during the relevant time period or made a decision
19 with respect to those checks during the relevant time
20 period, none of which applies to this witness. And,
21 therefore, everything that's being asked is irrelevant.
22 Nothing about a hypothetical check is relevant to this case.

23 MS. MOMOH: Again, Your Honor, these are not
24 hypothetical checks. If I needed to, I could simply go
25 through every single check with Mr. Haller and show him the

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1 checks that had been admitted into evidence. These are real
2 documents, live checks that M&I itself processed for
3 payment.

4 And these are the very checks that were shown to
5 witnesses of the bank who actually did not have any sort of
6 purview to checks. They showed the checks to Mary Pesch,
7 who was an AML analyst. She wasn't in the Fraud Detection
8 Group. She testified that she didn't have any access to
9 checks and they were still permitted to show the checks to
10 Mary Pesch. They showed the same checks --

11 THE COURT: I'm trying to understand the purpose
12 of showing these checks to this witness.

13 MS. MOMOH: Because he is the vice president of
14 the Fraud Detection Group. This was all within his purview.

15 MR. IHRIG: Your Honor --

16 MS. MOMOH: And, Your Honor --

17 MR. IHRIG: -- Mr. Haller's opinion on these
18 checks that he never saw in the ordinary course of business
19 is improper expert testimony and [inaudible].

20 COURT REPORTER: I'm sorry. Can you --

21 MR. IHRIG: It's undisclosed opinion testimony.

22 MS. MOMOH: Your Honor, if I may, what he's
23 arguing has not even come forth in this case. I haven't
24 asked him any questions as to whether he has seen these
25 specific checks.

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1 If they want to ask Mr. Haller questions about
2 that, my position is that that's appropriate for
3 cross-examination. But for purposes of what I am doing --
4 he's putting forth evidence that's not even in the record
5 yet. To me --

6 THE COURT: It's evidence -- tell me again what
7 the evidence is and why it is relevant.

8 MS. MOMOH: What he's arguing is --

9 THE COURT: No. You tell me what the evidence is
10 and why it's relevant.

11 MS. MOMOH: The evidence is that Mr. Haller is the
12 vice president -- he was the vice president of the Fraud
13 Detection Group in 2002 to 2008.

14 THE COURT: Okay.

15 MS. MOMOH: That's the relevant period of time --

16 THE COURT: Yes.

17 MS. MOMOH: -- with respect to the M&I -- with
18 respect to the PCI Ponzi scheme.

19 They have put forth in this case checks to
20 question whether M&I was turning a blind eye to activity
21 with respect to the PCI account. All I'm doing with this
22 witness is showing that, no, the bank did not turn a blind
23 eye with respect to activity -- check activity specifically
24 in the PCI account at the bank during this time and I'm
25 highlighting --

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1 THE COURT: And how is that shown by these two
2 exhibits?

3 MS. MOMOH: The decision for these -- the decision
4 for these checks ultimately, Your Honor, was that they were
5 paid.

6 THE COURT: Which means that they weren't turning
7 a blind eye?

8 MS. MOMOH: Because, according to the Carraker
9 fraud system, the only decision that the Fraud Detection
10 Group had to make at that time was to pay the check or not
11 pay the check.

12 And if they were not to pay the check, one option
13 would be to escalate the check for further review, which
14 could lead to a decision with respect to the SAR Review
15 Committee, which we talked about. As you know, it's hard to
16 not go any further than that for the purposes of what we
17 talked about.

18 MR. IHRIG: Your Honor, I think we've spent half
19 an hour now with this witness discussing checks that he's
20 never actually seen, and I think it's reached the end of its
21 utility and it's, frankly, irrelevant. That's our position.

22 THE COURT: You may ask limited additional
23 questions, but this is getting to the point of a waste of
24 time and the clarity and purpose of your questioning of this
25 witness about these checks is minimal.

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1 MS. MOMOH: Understood, Your Honor. Thank you.

2 (In open court)

3 BY MS. MOMOH:

4 Q. Mr. Haller, would the fact that a payroll check was
5 written from a depository account -- remember we were
6 talking about general operating accounts of a business.
7 Would the fact that a payroll check was written from that
8 sort of account in and of itself make that check a suspect?

9 A. No. It would be a part of the -- potentially the going
10 concern of the business.

11 Q. There's been discussion in this case about checks being
12 written to business officers of PCI, otherwise known as
13 insiders.

14 I want to ask you a general question. You
15 understand what an officer of a business is?

16 A. Yes.

17 Q. You understand what an insider of a business is?

18 A. Yes, an employee.

19 Q. So if a check from an account of a customer at M&I
20 during 2002 to 2008 was written to an insider or an employee
21 of the customer, the account of the customer was just a
22 general operating account, would that check have been a
23 suspect?

24 MR. IHRIG: Objection, lacks foundation, assumes
25 facts not in evidence.

1 THE COURT: Overruled. You may answer as to the
2 scenario that was presented.

3 THE WITNESS: No.

4 BY MS. MOMOH:

5 Q. What would have been the decision of payment under my
6 scenario?

7 MR. IHRIG: Objection, calls for speculation,
8 lacks foundation.

9 THE COURT: Overruled.

10 BY MS. MOMOH:

11 Q. In other words, if the check is not a suspect, then what
12 would be the decision on that check?

13 MR. IHRIG: Objection, leading.

14 THE COURT: Overruled.

15 THE WITNESS: That item would be paid.

16 BY MS. MOMOH:

17 Q. The decision would be to pay?

18 A. Yes.

19 Q. Mr. Haller, to your knowledge, was anyone at M&I or BMO
20 ever arrested or charged with involvement in the PCI Ponzi
21 scheme?

22 A. No.

23 Q. To your knowledge, was anyone at M&I or BMO involved in
24 the PCI Ponzi scheme?

25 A. No.

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1 MR. IHRIG: Objection, prosecutorial discretion.

2 THE COURT: Sustained.

3 BY MS. MOMOH:

4 Q. To your knowledge, did anyone at M&I or BMO know that
5 there was a Ponzi scheme happening before it was discovered
6 by the authorities in 2008?

7 MR. IHRIG: Objection, lacks foundation.

8 THE COURT: Sustained.

9 BY MS. MOMOH:

10 Q. Mr. Haller, do you know, you personally, do you know if
11 anyone at M&I or BMO was aware of the PCI Ponzi scheme
12 before it was discovered by the authorities in 2008?

13 MR. IHRIG: Objection, relevance.

14 THE WITNESS: Not to my knowledge.

15 THE COURT: Overruled.

16 THE COURT REPORTER: Your microphone isn't on.

17 THE COURT: Thank you.

18 BY MS. MOMOH:

19 Q. To repeat your response, "Not to your knowledge." Not
20 to your knowledge are you aware of anyone at M&I or BMO
21 knowing that there was a PCI Ponzi scheme happening before
22 it was discovered by the authorities in 2008?

23 A. No.

24 MR. IHRIG: Objection, leading.

25 THE COURT: Sustained.

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1 BY MS. MOMOH:

2 Q. Would there have been any incentive to the Fraud
3 Detection Group turning a blind eye and not properly
4 reviewing a check?

5 MR. IHRIG: Objection, lacks foundation, calls for
6 speculation.

7 THE COURT: Sustained.

8 BY MS. MOMOH:

9 Q. You personally, Mr. Haller, would there have been any
10 incentive to you turning a blind eye and not properly
11 reviewing a check?

12 A. No.

13 Q. Mr. Haller, during the time that PCI was a customer of
14 M&I, did you receive any money or things of value from PCI
15 or any PCI personnel?

16 A. No.

17 Q. Did you receive any favors from PCI or PCI personnel?

18 A. No.

19 Q. Did any PCI personnel ever try to persuade you not to
20 file any sort of required report?

21 A. No.

22 Q. During the time that PCI was a customer of M&I and BMO,
23 did you ever provide any special favors for PCI personnel?

24 A. No.

25 Q. Are you aware of any M&I employee who did?

1 MR. IHRIG: Objection, lacks foundation.

2 THE COURT: Sustained.

3 BY MS. MOMOH:

4 Q. Before September of 2008 did you have any reason to
5 suspect that PCI and Petters were involved in a Ponzi
6 scheme?

7 A. No.

8 Q. Did you have any incentive at all to look the other way
9 if you thought that there was suspicious activity in the PCI
10 account?

11 A. No.

12 MS. MOMOH: Your Honor, I have no further
13 questions for the witness at this time.

14 THE COURT: Counsel, we have ten minutes before
15 the jury will be excused and I will be instructing them
16 during some portion of that ten minutes.

17 MR. IHRIG: Okay. Would you like me to get
18 started or would you like me to hold off? Would you like me
19 to get started cross-examining the witness?

20 THE COURT: I think we should reserve your cross
21 until tomorrow and give the jury the benefit of a few
22 minutes after a long day.

23 MR. IHRIG: I'm sorry. Did I misunderstand? Did
24 you instruct me to wait until tomorrow?

25 THE COURT: Yes.

1 MR. IHRIG: Thank you, Your Honor.

2 THE COURT: So, Members of the Jury, during this
3 recess and every recess you must not discuss this case with
4 anyone, including other jurors, members of your family,
5 people involved with the trial, or anyone else. And do not
6 allow anyone to discuss the case with you or within your
7 hearing.

8 As you know, only you have been chosen as jurors
9 in this case and only you have sworn to uphold the law. No
10 one else has been chosen to do this important work.

11 And as you know also, you should not discuss this
12 case among yourselves before the case has been heard --
13 you've heard all of the evidence in this case and the case
14 has been submitted to you by me for deliberations because it
15 may affect your final decision.

16 And when I say you must not discuss the case, I
17 also mean no other means of communication about the case,
18 such as e-mail, text messages, blogging, or engaging in
19 other written or oral forms or electronic forms of
20 communication.

21 Only in this way will you be able to decide the
22 case fairly based solely on the testimony, the evidence
23 presented in the courtroom, and my instructions.

24 And so, as you know, I don't repeat these
25 instructions every time, but it is certainly important that

1 you abide by them throughout your service.

2 I want to thank you for your service. I hope you
3 have a great evening, and we will see you tomorrow. All
4 rise for the jury.

5 (Jurors excused)

6 **IN OPEN COURT**

7 **(JURY NOT PRESENT)**

8 THE COURT: Sir, you are excused from the witness
9 stand. We will begin tomorrow at 9:00 a.m.

10 THE WITNESS: Thank you.

11 THE COURT: You're welcome.

12 MR. MOHEBAN: Your Honor, if I may, we have a
13 couple, I think, scheduling and housekeeping things that
14 might be good to use this time, if we can?

15 THE COURT: You may.

16 MR. MOHEBAN: First of all, you'll probably be
17 happy to hear that we think we're getting close to
18 concluding our case. It's possible that that would happen
19 by the end of this week. We're going to evaluate that. But
20 in light of the fact that you've told us -- so I'm not
21 guaranteeing that, but I want you to know that we're heading
22 into that direction.

23 THE COURT: I appreciate the progress report --

24 MR. MOHEBAN: Okay.

25 THE COURT: -- and recognize the fact that it is a

1 prediction.

2 MR. MOHEBAN: Right, it's an estimate.

3 THE COURT: An estimate.

4 MR. MOHEBAN: And in light of your announcing
5 yesterday that we're off Monday, Tuesday, and Wednesday of
6 next week, I think both sides are interested in a little bit
7 of planning.

8 One of the things we would like to do is
9 understand when -- now that you've given the briefing
10 schedule on the Rule 50, we'd like to know when we can argue
11 that motion because we think there are some pretty dramatic
12 things that have happened in the course of this case in
13 terms of the positions that the trustee has taken.

14 They started this case alleging that there was
15 actual knowledge of the bank, that the bank knew about the
16 fraud. We had Mr. Kelley on the stand testifying that he
17 doesn't contend that anymore, as has their expert, and there
18 has been no evidence adduced to that. That has a big impact
19 on their claims, which mostly involve -- require a showing
20 of actual knowledge. And on the other remaining claim we
21 have some important issues on that.

22 So we'd like to be heard on the Rule 50 and we'd
23 like to know when that could happen. We'd like to know when
24 we would be talking about a charging conference because we
25 think we could be looking at closing sometime next week.

1 THE COURT: You said closing sometime?

2 MR. MOHEBAN: Next week.

3 THE COURT: Correct.

4 MR. MOHEBAN: But there's only two days and those
5 are some things that have to happen between now and then.
6 So we're just interested in your thoughts, and I'm sure
7 counsel has their own thoughts on that.

8 THE COURT: Thank you.

9 MR. COLLYARD: Your Honor, I believe you addressed
10 the briefing schedule for the -- you addressed the briefing
11 schedule. We're just going to wait for your guidance on
12 hearing that. We don't think -- like you had already
13 indicated to us, it would be premature to have argument on
14 those issues until the briefing is done and considered. So
15 to the extent that Mr. Moheban is suggesting we have any
16 argument in the next day or two, that would be premature and
17 we maintain that position.

18 I reached out to counsel last night to get an idea
19 as to when they may close their case. They told me that
20 they'd let me know more about that hopefully at the end of
21 this session.

22 And so we, too, would reiterate the guidance on
23 when a charge conference may occur, if that would be this
24 week or if that would be next week. That would be,
25 obviously, helpful information for us as well. That would

1 be the only other thing that I would add.

2 MR. MOHEBAN: And to be clear, we're not
3 suggesting that you take argument before the briefing is
4 done, but I'm just trying to figure out when that could
5 happen.

6 And there's -- I don't know if you want to talk
7 about that and complete that discussion?

8 THE COURT: I think we've completed the
9 discussion.

10 MR. MOHEBAN: Okay. All right. Then there's one
11 other thing I want to raise, and it has to do with a
12 rebuttal witness that we would like have you consider us
13 present.

14 There's two things that have happened relating to
15 issues about these backup tapes and the testimony. Of
16 course, today you severely limited the testimony of
17 Mr. Stroble. And in addition to that, we had the outright
18 exclusion of Mr. Grant.

19 And as a result of that, we have a hole in our
20 defense, which we think is not any of our doing, but it's a
21 result -- and I want to make sure you appreciate what has
22 happened.

23 The first thing is with respect to Mr. Grant,
24 there was an agreement of counsel that they were going to --
25 they had a witness they wanted to add to their list,

1 Mr. Kiefer. We had a witness that we wanted to add,
2 Mr. Grant. We had identified an FTI representative; we just
3 didn't have the name. And then we gave them the name and
4 there were these cross objections.

5 We made an agreement, which was we wouldn't object
6 to Mr. Kiefer, and we didn't. He came here and he testified
7 in support of their 1006 exhibits. And their agreement was,
8 in writing, that they would not object to the addition of
9 the FTI witness in exchange for you not objecting to our
10 addition of Mr. Kiefer.

11 And so the result of that is we let Mr. Kiefer go
12 on. We didn't object. And then when it came to their turn,
13 they did object. And for a variety of reasons, he hasn't
14 been able to testify so far.

15 The concern that we have now is focused on what
16 testimony has been heard by the jury about these tapes that
17 were found in 2014. And we heard a lot of questions today
18 that there were millions of pages of e-mails on the backup
19 tapes that Mr. Vanderheyden was told you don't know whether
20 these were in existence or not. And there's been a
21 misimpression given to the jury and it has to do with these
22 tapes that were located in 2017.

23 What we haven't been able to present to the jury
24 is that whether or not you want to think that the 2014 tapes
25 are the same as the 2017 tapes, the parties can debate that,

1 but with respect to the tapes that were found in 2017, it's
2 undisputed that, per Judge Sanberg, we produced -- we
3 recreated those tapes and produced millions of e-mails,
4 which then were the subject of many of the depositions that
5 are being presented here in this trial.

6 And the way that the evidence has gone in and
7 because of certain exclusions of certain witnesses
8 categorically, we haven't been able to simply make the point
9 that as of those 2017 tapes, we were able to restore them
10 and produce the documents and some of those records are in
11 the record in this trial.

12 So we would like to have you consider that with
13 respect to Mr. Grant, that he be allowed to testify on that
14 narrow subject. We're not actually asking you to revisit
15 the other areas that have been excluded, but on that subject
16 we'd like to offer him.

17 THE COURT: You want Mr. Grant to testify about
18 the restoration of the 2017 tapes?

19 MR. MOHEBAN: That's right, and the fact that
20 there were documents and that they were -- his firm was
21 involved with the restoration and production of records that
22 then were provided to the trustee.

23 So there's sort of three sets of issues on tapes.
24 There's what happened in 2010 and '11, which has been
25 addressed at trial. There's what happened in 2014, which

1 has been addressed at trial. And the missing piece has been
2 this 2017 piece. That's what we'd like you to consider.

3 Thank you.

4 THE COURT: Thank you, Counsel.

5 MR. COLLYARD: Just briefly, Your Honor, there was
6 absolutely no agreement that we would allow for Mr. Grant
7 to come here and testify in exchange for Mr. Kiefer
8 testifying. What the agreement was is we wouldn't make some
9 objections based on untimeliness on the witness list.

10 We moved and he was -- Mr. Grant was excluded
11 under Rule 37(c)(1), I believe, of the Federal Rules of
12 Evidence, rightfully so. That had been a witness that had
13 never been identified to us during this case, never had the
14 opportunity to depose him.

15 And the only subject matter that he would testify
16 to was the same exact subject matter that you yourself had
17 said that Mr. Stroble was not allowed to testify to, and
18 that was these 2017 tapes.

19 But what Mr. Grant wants to do is he wants to talk
20 about how many e-mails were produced from them, which is
21 completely irrelevant to the findings of both the Bankruptcy
22 Court and your reaffirmance.

23 And I'm going to go off the top of my head, so if
24 I need to provide you the correct citation, I will do it,
25 but I believe in your July order, Footnote 5, you even

1 addressed that very issue and you say something along the
2 lines of you are not persuaded about their argument for
3 producing millions of pages of e-mails as to how that
4 pertains to these particular issues.

5 So you've already addressed this issue. The same
6 arguments apply, that I wouldn't be able to rebut any of it
7 by not calling lawyers, but not proving the lies, by doing
8 all of the things. And so we've already litigated the 2017
9 issue to death.

10 And I think that covers it all, unless you have
11 covers for me, Your Honor.

12 THE COURT: I don't.

13 MR. COLLYARD: Thank you.

14 THE COURT: Anything further?

15 MR. MOHEBAN: Well, I have this -- the agreement.
16 It's in writing. I can hand up to you the e-mail agreement.

17 THE COURT: Do you have a specific rebuttal
18 witness in mind?

19 MR. MOHEBAN: Mr. Grant.

20 THE COURT: And then it seems to me, rather than
21 addressing arguments back and forth here, it needs to be --
22 a motion needs to be filed, briefed, and then I'll decide.

23 MR. MOHEBAN: Okay. I brought it up this way only
24 because of the instruction we got this morning about no more
25 briefs without approval. So I'll take it that that's --

1 THE COURT: You've received approval.

2 MR. MOHEBAN: -- our approval and will proceed
3 accordingly.

4 All right. Thank you.

5 THE COURT: Okay. I'm going to confer with my law
6 clerk about our timing for the charge conference and then
7 give you some information about that. I assume that that's
8 something that you'd be interested in?

9 MR. ANTHONY: So we'll wait.

10 LAW CLERK: All rise.

11 (Discussion off the record)

12 (Court adjourned at 5:04 p.m.)

13 * * *

14 I certify that the foregoing is a true and correct
15 copy of the transcript originally filed on 12/05/2022 and
16 incorporating redactions requested by Attorney Adine S.
Momoh.

17 Certified by: s/ Lori A. Simpson

18 Lori A. Simpson, RMR-CRR

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